

# **BCI Exhibit 631**

1 IN THE UNITED STATES BANKRUPTCY COURT  
2 FOR THE SOUTHERN DISTRICT OF NEW YORK  
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In re: )  
5 ) Chapter 11  
LEHMAN BROTHERS ) Case No. 08-13555(JMP)  
6 HOLDINGS, INC., et al, ) (Jointly Administered)  
 )  
7 Debtors. )  
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12 30(b)(6) DEPOSITION OF  
13 CLEARY GOTTlieb STEEN & HAMILTON LLP  
14 by  
15 VICTOR I. LEWKOW  
16 New York, New York  
17 Wednesday, February 10, 2010  
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19  
20  
21  
22

23 Reported by:  
24 MAYLEEN CINTRON, RMR, CRR  
25 JOB NO. 28226

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<p>1 2 3 4 February 10, 2010 5 10:02 a.m. 6 7 8 30(b)(6) DEPOSITION OF CLEARY 9 GOTTLIEB STEEN &amp; HAMILTON LLP, by VICTOR I. 10 LEWKOW, held at the offices of Cleary 11 Gottlieb Steen &amp; Hamilton LLP, 450 Park 12 Avenue, New York, New York, pursuant to 13 Notice, before MayLeen Cintron, a Registered 14 Merit Reporter, Certified Realtime Reporter, 15 and Notary Public of the State of New York. 16 17 18 19 20 21 22 23 24 25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 A P P E A R A N C E S: 2 3 JONES DAY LLP 4 Attorneys for Debtors - Lehman Brothers, Inc. 5 222 East 41st Street 6 New York, New York 10017-6702 7 BY: ROBERT W. GAFFEY, ESQ. 8 BRIDGET CRAWFORD, ESQ. 9 10 BOIES, SCHILLER &amp; FLEXNER LLP 11 Attorneys for Barclays 12 5301 Wisconsin Ave., N.W. 13 Washington D.C. 20015 14 BY: HAMISH HUME, ESQ. 15 16 17 QUINN, EMANUEL, URQUHART, 18 OLIVER &amp; HEDGES LLP 19 Attorneys for the Creditors Committee 20 51 Madison Avenue - 22nd Floor 21 New York, New York 10010 22 BY: JAMES TECCE, ESQ. 23 24 25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 A P P E A R A N C E S: (Cont'd) 2 3 HUGHES, HUBBARD &amp; REED LLP 4 Attorneys for the SIPA Trustee 5 One Battery Park Plaza 6 New York, New York 10004-1482 7 BY: WILLIAM R. MAGUIRE, ESQ. 8 AMINA HASSAN, ESQ. 9 10 11 CLEARY GOTTLIEB STEEN &amp; HAMILTON LLP 12 Attorneys for the Witness: Victor Lewkow 13 One Liberty Plaza 14 New York, New York 10006 15 BY: BOAZ S. MORAG, ESQ. 16 ROBERT P. DAVIS, ESQ. 17 18 19 20 - - - 21 22 23 24 25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow- 2 V I C T O R I. L E W K O W, 3 called as a witness, having been duly 4 sworn by a Notary Public, was examined 5 and testified as follows: 6 THE REPORTER: Please state your 7 full name for the record. 8 THE WITNESS: Victor -- do you need 9 a middle name? Ira Lewkow, L-E-W-K-O-W. 10 MR. GAFFEY: That's all we needed. 11 We just wanted to know your middle 12 name. 13 EXAMINATION BY 14 MR. GAFFEY: 15 Q. Good morning, Mr. Lewkow. My name 16 is Bob Gaffey, I'm from Jones Day and we are 17 special counsel to the Debtors in this 18 proceeding. 19 Have you had your deposition taken 20 before? 21 A. Once. 22 Q. In the interest of efficiency, I 23 will give you the short version of the usual 24 instructions. If at any point you don't 25 understand a question, please say so and I</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1                   <b>-Lewkow-</b> 2   <b>will try to rephrase it so we understand each</b> 3   <b>other. If you need a break at any time, say</b> 4   <b>so and we can do that.</b> 5                   (Telephone interruption.) 6                   <b>Q. If you need a break at any time,</b> 7   <b>just say so. If there is a question pending,</b> 8   <b>I prefer we get an answer on the record before</b> 9   <b>we take a break?</b> 10                  MR. GAFFEY: Let me ask the 11                  reporter to mark, what's the next 12                  exhibit, 613A, a copy of a declaration 13                  submitted by Barclays in this matter. 14                  (Deposition Exhibit 613A, 15                  Declaration of Victor Lewkow, marked 16                  for identification, as of this date.) 17                  <b>Q. Is that your Declaration, sir?</b> 18                  A. It is. 19                  <b>Q. Let me ask you to turn your</b> 20   <b>attention, please, to Paragraph 4 of your</b> 21   <b>Declaration.</b> 22                  <b>By way of background, my questions</b> 23   <b>today will be about the sale transaction</b> 24   <b>that's at issue in this matter, that is the</b> 25   <b>transaction between Lehman and Barclays, to</b>                     TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2   <b>which I understand your Declaration is</b> 3   <b>addressed.</b> 4                   <b>In Paragraph 4 of your Declaration,</b> 5   <b>you say, "The transaction was never discussed</b> 6   <b>or documented as what might be called a</b> 7   <b>'balance sheet' transaction, which would have</b> 8   <b>included pre-closing and/or post-closing</b> 9   <b>purchase price adjustment provisions relating</b> 10   <b>to a valuation of the transferred assets and</b> 11   <b>liabilities".</b> 12                  <b>Is the term "balance sheet</b> 13   <b>transaction" a term of art of some kind?</b> 14                  MR. MORAG: Object to the form. 15                  You can answer. 16                  A. In many private acquisitions as 17                  opposed to public company acquisitions, there 18                  are price adjustments tied to an audited 19                  balance sheet that is prepared as of the 20                  closing date. 21                  And I'm not sure if it is a broadly 22                  used term, but it certainly is what I was 23                  talking about. So... 24                  <b>Q. I'm sorry. Are you done with your</b> 25   <b>answer?</b>                     TSG Reporting - Worldwide   877-702-9580</p>
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<p>1                   <b>-Lewkow-</b> 2                  A. Yes. 3                  <b>Q. So, there are not, I take it,</b> 4   <b>particular -- there is not a defined list of</b> 5   <b>things you expect to find, that you need to</b> 6   <b>see in a transaction in order to qualify as a</b> 7   <b>so-called "balance sheet transaction"; is that</b> 8   <b>right?</b> 9                  MR. MORAG: Objection to form. 10                  A. I would say that in my experience, 11                  in the context of buying a business where 12                  there were a lot of financial assets valued 13                  and liabilities, the value of which changed 14                  over -- could change or would change or did 15                  change over time between signing and closing 16                  or between if there weren't represented -- a 17                  representation by the seller as to the value 18                  as of signing, starting date could be actually 19                  earlier than the signing of the asset purchase 20                  agreement. 21                  If between whatever date a balance 22                  sheet was represented as of and the closing 23                  date, the value of the assets and liabilities 24                  had changed and I would expect as part of a 25                  balance sheet transaction, for there to be pre                     TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2   <b>or post-closing price -- pre or post- closing</b> 3   <b>price adjustments.</b> 4                   <b>Q. Now in the transaction that was</b> 5   <b>agreed between Lehman and Barclays initially</b> 6   <b>on September 16th, that is embodied in the</b> 7   <b>Asset Purchase Agreement, was there any such</b> 8   <b>purchase price adjustment provision?</b> 9                  A. There was no balance sheet audited 10                  financial statement valuation type balance 11                  sheet adjustment, no. 12                  <b>Q. Was there a purchase price</b> 13   <b>adjustment provision?</b> 14                  MR. MORAG: Object to form. 15                  A. There was a -- I'm going to say -- 16                  my answer would be no in the usual sense. I 17                  would comment, and I think that is what you're 18                  getting at, we can call it -- if you want to 19                  call it "purchase price adjustment", you 20                  could, it is simply a matter of semantics. 21                  But there was a provision in the 22                  original deal -- there were two provisions 23                  that had aspects of -- no. There was one 24                  provision that had aspects of additional 25                  consideration potentially flowing to the                     TSG Reporting - Worldwide   877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 seller. There was a -- there was a provision</p> <p>3 that said that on a certain pool of positions,</p> <p>4 that we would be -- that Barclays would be</p> <p>5 acquiring at the closing, that if, as I</p> <p>6 recall -- and you know, without having the</p> <p>7 Agreement in front of me to look at the words,</p> <p>8 I always defer to what's in the contract.</p> <p>9 But my recollection is that the --</p> <p>10 there was a provision that if within some</p> <p>11 period, I think it was a year, to the extent</p> <p>12 that Barclays actually sold positions -- not</p> <p>13 what their value was on a given date or the</p> <p>14 like, not as audit, not if they held</p> <p>15 positions, even if those positions increased</p> <p>16 enormously in value or if they went down in</p> <p>17 value.</p> <p>18 But if with respect to some pool --</p> <p>19 and I don't remember the details of how it</p> <p>20 worked because that provision was later</p> <p>21 dropped, as you know. There was a provision</p> <p>22 that if -- with respect to some of those</p> <p>23 assets, if we -- if Barclays sold them during,</p> <p>24 I think, the first year, there would be some</p> <p>25 sharing of the -- of the profit compared to</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 what -- I forget what the base was exactly, as</p> <p>3 to what date the assumed valuation was.</p> <p>4 So there was a provision for</p> <p>5 additional consideration potentially to flow</p> <p>6 to the seller.</p> <p>7 <b>Q. I'll show you the Asset Purchase</b></p> <p>8 <b>Agreement in a minute and we'll spend some</b></p> <p>9 <b>time with it today.</b></p> <p>10 <b>But is the provision that you</b></p> <p>11 <b>described, is that fairly described as a</b></p> <p>12 <b>post-closing purchase price adjustment</b></p> <p>13 <b>provision?</b></p> <p>14 MR. MORAG: Objection. Asked and</p> <p>15 answered.</p> <p>16 A. Yeah, I have nothing more to say</p> <p>17 other than what I said on that subject.</p> <p>18 <b>Q. I'm not sure I have an answer to</b></p> <p>19 <b>the question as to whether it is -- the</b></p> <p>20 <b>provision you described is what you would</b></p> <p>21 <b>describe, and I'm referring to Paragraph 4 of</b></p> <p>22 <b>your affidavit, as a "post-closing purchase</b></p> <p>23 <b>price adjustment provision"?</b></p> <p>24 A. Well, with due respect, if you read</p> <p>25 my declaration, it says, "...a pre-closing</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 and/or post-closing purchase price adjustment</p> <p>3 provision relating to the valuation of the</p> <p>4 transferred assets and liabilities". This was</p> <p>5 not such a provision.</p> <p>6 <b>Q. So to qualify as a balance sheet</b></p> <p>7 <b>transaction, in your view, the pre or post</b></p> <p>8 <b>closing purchase price adjustment provision</b></p> <p>9 <b>would have to relate to a valuation of the</b></p> <p>10 <b>assets and liabilities? It's that last piece,</b></p> <p>11 <b>"valuation of the assets and liabilities" that</b></p> <p>12 <b>defines it as a purchase price adjustment</b></p> <p>13 <b>provision as you meant it in your Declaration?</b></p> <p>14 MR. MORAG: Object to form.</p> <p>15 A. As I said earlier, to me a balance</p> <p>16 sheet transaction is when you later prepare --</p> <p>17 I'm not sure that the word -- I would say do a</p> <p>18 valuation from an accounting standpoint. As a</p> <p>19 balance sheet, normally you would prepare a</p> <p>20 balance sheet based on generally accepted</p> <p>21 accounting principles, have it audited and</p> <p>22 adjust the purchase price based on that.</p> <p>23 <b>Q. Is there a reason such a mechanism</b></p> <p>24 <b>was not included in the transaction at issue</b></p> <p>25 <b>here?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 A. You know, I would -- I don't recall</p> <p>3 whether at any point in time, whether Lehman</p> <p>4 or its advisors requested such a provision. I</p> <p>5 just don't recall. Certainly if they did, it</p> <p>6 came and went very quickly in the discussions</p> <p>7 of the concept of the Asset Purchase</p> <p>8 Agreement. But I don't recall there ever</p> <p>9 being such a provision.</p> <p>10 I would note that we were -- as</p> <p>11 everybody knew then and knows now, it was an</p> <p>12 incredibly volatile couple of days. The Asset</p> <p>13 Purchase Agreement was being negotiated on</p> <p>14 that Monday and Tuesday after Lehman had filed</p> <p>15 for Chapter 11 late Sunday night, early Monday</p> <p>16 morning.</p> <p>17 And I think the idea that anyone</p> <p>18 had a wonderfully exact knowledge as to what</p> <p>19 the value of portfolio assets in particular</p> <p>20 were at that point in time, it would be</p> <p>21 amazing because there was a very uncertain</p> <p>22 value at that point in time.</p> <p>23 <b>Q. Did Cleary Gottlieb play any role</b></p> <p>24 <b>in the negotiation of the transaction with</b></p> <p>25 <b>regard to arriving at a valuation of the</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1                   <b>-Lewkow-</b> 2   <b>assets to be transferred?</b> 3       MR. MORAG: Object to the form. 4       Vague. 5       A. No. 6       <b>Q. Were there negotiations between the</b> 7 <b>parties concerning the value of the assets to</b> 8 <b>be transferred?</b> 9       A. As described in my declaration, 10 there were discussions, I would not -- I don't 11 believe there was a negotiation, as I heard it 12 described. And I want to stay away from 13 privileged communications, although I'm not 14 sure I have any in particular in mind now. 15 But obviously, I assume none of -- you're not 16 asking me at any point -- if you are, I assume 17 I'll be telling you not, that I won't, or one 18 of the lawyers here will tell me not to. 19       But it was my understanding that 20 Lehman -- that Barclays -- let me step back a 21 second. 22       Even before the bankruptcy, even 23 before that Friday morning when -- the Friday 24 before the 15th, the 12th I guess when 25 Barclays had first retained us certainly, they TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2   may have gotten involved a little bit the day 3 before or something. But even before Barclays 4 had started thinking about, as far as I know, 5 Lehman, there had been stories in the press 6 about suggesting that Lehman had been slow to 7 revalue assets, and that they had inflated 8 values in their portfolio. 9       But beyond that in the very limited 10 time, as I understood it, that Barclays had 11 been provided with some information about the 12 portfolio that we were -- that Barclays was 13 being asked to -- that it be acquiring as part 14 of its acquisition of basically the entire 15 business with certain exceptions and the 16 assumption of very substantial certain 17 specified liabilities, when their people, 18 financial people, trading people, whoever it 19 was -- and I'm not sure I knew all the people 20 involved. It was a new client in the 21 United -- I don't know the name of all the 22 people who were going -- who were around and 23 in the different rooms that we were -- that 24 meetings were taking place on that Monday and 25 Tuesday up at Lehman Brothers on the -- on the TSG Reporting - Worldwide 877-702-9580</p>
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<p>1                   <b>-Lewkow-</b> 2   big conference and dining floor. 3       But it was my understanding that 4 Barclays people had reviewed certain 5 information about the assets and liabilities 6 and had thought that the -- there were 7 large -- certain category types of assets and 8 the like that had, as last marked by Lehman, 9 were substantially overstated. Whether they 10 had been overstated as of the date they 11 originally been marked or were overstated 12 because of the passage of a couple of days, I 13 believe they would not have been marked for a 14 couple of days. It's my recollection. I 15 could be wrong on that. 16       But one way or another, or a 17 combination of the two, that the Barclays 18 people had concluded that the Lehman marks 19 were substantially overstated. 20       <b>Q. When was Cleary first retained in</b> 21 <b>connection with this transaction?</b> 22       A. We were retained on Friday. Not on 23 this transaction, we were retained on the 24 Friday before the bankruptcy on the 12th, 25 early that morning, to assist Barclays in TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2   looking at a potential much larger transaction 3 to buy not just a substantial part of the U.S. 4 and Canadian broker-dealer investment banking 5 business, but a much larger portion of Lehman 6 Brothers. 7       I don't know whether initially -- I 8 can't recall whether initially it might have 9 been all of Lehman. I think very early it 10 became clear it was not quite everything but 11 it was a larger universe than what we ended up 12 trying to do in doing, starting with the 13 Monday filing the Chapter 11. 14       <b>Q. In the interest of everyone's time,</b> 15 <b>we've taken a lot of depositions in this case.</b> 16 <b>Some time over the weekend, the concept of</b> 17 <b>that larger transaction came to an end, those</b> 18 <b>negotiations?</b> 19       A. Correct. Sunday around midday. 20       <b>Q. And around some point, negotiations</b> 21 <b>resumed with respect of the smaller</b> 22 <b>transaction that was ultimately concluded,</b> 23 <b>correct?</b> 24       A. I don't know if it matters. But I 25 would use the word "resume." TSG Reporting - Worldwide 877-702-9580</p>

-Lewkow-

**Q. Okay.**

A. As far as I can tell, they stopped on Sunday, people went home and saw their families. And I got a call Monday morning, "Well, can you come up to Lehman Brothers? We're going to see if we can do a deal. If they did file as they said they would" -- we thought they would -- "they filed in Chapter 11 and now want to see whether or not there's something we can do to purchase" -- you know, I don't remember how it was described to me in that initial call.

But, "Can you come up to Lehman Brothers?"

MR. MORAG: Mr. Lewkow, let me caution you on privilege. I think you just said the gist to the conversation, which is sufficient for these purposes.

**Q. You came back?**

A. I went up to Lehman Brothers.

**Q. Let's just talk about the period when you came back. In the negotiations that began then, what steps, if any, were taken to accommodate Barclays' view that the Lehman**

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-Lewkow-

**marks were substantially overstated, to use your term?**

MR. MORAG: Objection. Vague.

A. Yeah. I guess -- I don't know what you mean by "accommodate." And the word -- you also used the word "the view." I think that view -- I did mention the newspaper.

MR. MORAG: I think we need a break.

(Whereupon, a recess was taken from 10:22 a.m. to 10:25 a.m.)

BY MR. GAFFEY:

**Q. In the negotiations that took place in connection with the transaction that's brought us here today, Mr. Lewkow, were there discussions, to your knowledge, between the folks at Barclays and the folks at Lehman about Barclays' view that the assets of Lehman were overstated on its books?**

MR. MORAG: Object to the form.

A. Yes. As to certain assets.

**Q. Can you tell me what you know with regard to those discussions?**

A. As I stated in my declaration,

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-Lewkow-

Barclays, was my understanding, that Barclays' trading and/or financial folks had been provided certain information about the trading positions; that it was contemplated that Barclays would assume as part of an acquisition of the business of substantially all of the business.

And in the course of that, Barclays had -- Barclays people had reached the view that there were very significant -- that the aggregate carrying value that they had been furnished by Lehman was substantially higher than Barclays believed was appropriate that Monday or Tuesday.

**Q. And by "aggregate carrying value", do you mean Lehman's book value?**

A. It's my -- I'm not an accountant, as you know. I'm a lawyer. It is my understanding that for an entity such as Lehman, they are supposed to -- under regulatory accounting principles, maybe generally accepted accounting principles, I don't know. But as a general matter, broker-dealers mark their portfolio to market

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on a daily basis. And I believe that means their book value is effectively adjusted each day. To the extent that a balance sheet is prepared, the balance sheet is prepared based on those marks.

**Q. So when you use the phrase "aggregate carrying value," were you referring to Lehman's books marked to market in that manner?**

MR. MORAG: Object to the form.

MR. HUME: Objection, asked and answered.

A. I think I've got nothing more to say on that.

**Q. What did you mean to say when you said "aggregate carrying value"?**

A. The value -- what I hear people refer to as "the marks." What they were being marked at on the books of Lehman by Lehman.

**Q. And in the negotiations of the transaction, were any steps taken to address Barclays' concern that the aggregate carrying value was substantially higher than it should have been?**

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<p>1                   <b>-Lewkow-</b></p> <p>2                   MR. HUME: Objection. Vague.</p> <p>3                   MR. MORAG: Objection. Asked and</p> <p>4                   answered.</p> <p>5                   A. I have -- I've told you -- I have</p> <p>6                   nothing to add to my answer.</p> <p>7                   <b>Q. Well, I'm afraid that's not going</b></p> <p>8                   <b>to work, so I do need an answer to the</b></p> <p>9                   <b>question.</b></p> <p>10                  A. Your question asked in the</p> <p>11                  negotiations. I don't -- I don't -- if you</p> <p>12                  mean in the negotiations of the transaction, I</p> <p>13                  think my answer would be no, as I have said in</p> <p>14                  my declaration and in my statement.</p> <p>15                  Barclays was furnished information</p> <p>16                  which led it to believe that Lehman's marks</p> <p>17                  were not correct and overstated the value of</p> <p>18                  assets, and was -- Barclays was not prepared</p> <p>19                  to do a deal with -- where they were</p> <p>20                  overstated marks on the Lehman books of large</p> <p>21                  amounts.</p> <p>22                  <b>Q. So if Barclays was not prepared to</b></p> <p>23                  <b>do a deal where there were overstatements on</b></p> <p>24                  <b>Lehman's books of large amounts, what did</b></p> <p>25                  <b>Barclays do to address that concern in order</b></p> <p>                  TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2                   <b>to conclude a transaction?</b></p> <p>3                   A. Barclays made -- made its</p> <p>4                   position -- made its view of the marks, that</p> <p>5                   they were overstated substantially, clear to</p> <p>6                   Lehman people and urged -- my understanding,</p> <p>7                   they urged Lehman to take a fresh look at the</p> <p>8                   values that they were carrying them on on</p> <p>9                   their books because it was at a crazy world,</p> <p>10                  and it was something that Lehman should take a</p> <p>11                  fresh look at to -- to both deal with the</p> <p>12                  passage of time and information.</p> <p>13                  I don't know what -- you know, in</p> <p>14                  my declaration, I mention an example that was</p> <p>15                  mentioned in a broad public -- "public" is the</p> <p>16                  wrong statement. With both sides present,</p> <p>17                  including lawyers, including me -- of the</p> <p>18                  example of a particular position where</p> <p>19                  Barclays had a junior position of -- junior</p> <p>20                  tranche position from the same issuer, same</p> <p>21                  type of security, and was carrying it --</p> <p>22                  I'm sorry. Barclays had a senior</p> <p>23                  position and was carrying it at a bigger</p> <p>24                  discount to par than Lehman was carrying the</p> <p>25                  junior position. And those are -- you know,</p> <p>                  TSG Reporting - Worldwide   877-702-9580</p>
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<p>1                   -Lewkow-</p> <p>2                   I'm sure there were other examples. That was</p> <p>3                   the one that was easy to explain to us lawyers</p> <p>4                   as evidencing why Barclays believed Lehman</p> <p>5                   needed to take a fresh look at what it -- how</p> <p>6                   it was carrying certain portions of the</p> <p>7                   portfolio on its books and whether or not they</p> <p>8                   needed to revise their marks.</p> <p>9                   <b>Q. Did the level at which Lehman was</b></p> <p>10                  <b>carrying its assets on the books affect the</b></p> <p>11                  <b>price which Barclays was willing to pay on the</b></p> <p>12                  <b>transaction?</b></p> <p>13                  MR. MORAG: Object to form.</p> <p>14                  A. I think it affected their</p> <p>15                  willingness to do the deal. The price was</p> <p>16                  what was in the Agreement where we acquired</p> <p>17                  certain assets, acquired certain liabilities,</p> <p>18                  agreed to make certain payments, assumed a</p> <p>19                  certain level of obligations.</p> <p>20                  We were buying a business as a</p> <p>21                  whole; the purchase price was the whole</p> <p>22                  transaction. We were not -- no one from</p> <p>23                  Barclays went into this to buy a portfolio; it</p> <p>24                  was to buy substantially all the assets of a</p> <p>25                  business.</p> <p>                  TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   -Lewkow-</p> <p>2                   <b>Q. Describe for me, if you would, the</b></p> <p>3                   <b>price that Barclays paid in that purchase.</b></p> <p>4                   A. At what time, sir?</p> <p>5                   <b>Q. Good point. Describe for me the</b></p> <p>6                   <b>price that Barclays agreed to pay for that</b></p> <p>7                   <b>business on September 16, 2008?</b></p> <p>8                   MR. HUME: I'm going to just object</p> <p>9                   to the extent that it calls for</p> <p>10                  interpretation of the contract which he</p> <p>11                  hasn't been shown.</p> <p>12                  (Discussion off the record.)</p> <p>13                  <b>Q. I think the question on the table,</b></p> <p>14                  <b>Mr. Lewkow, is: Will you describe for me the</b></p> <p>15                  <b>price that Barclays agreed to pay for that</b></p> <p>16                  <b>business on September 16, 2008?</b></p> <p>17                  MR. MORAG: Objection. To the</p> <p>18                  extent it calls for a legal</p> <p>19                  interpretation of the contract. If you</p> <p>20                  recall generally the terms.</p> <p>21                  A. Look, I think the contract is the</p> <p>22                  contract. Without having it in front of me, I</p> <p>23                  may omit certain things. But in general</p> <p>24                  terms, my recollection is that under the Asset</p> <p>25                  Purchase Agreement as signed late on the 16th</p> <p>                  TSG Reporting - Worldwide   877-702-9580</p>



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<p>1 -Lewkow-</p> <p>2 or early on the 17th, I think it is dated the</p> <p>3 16th, Barclays agreed to make payments. Some</p> <p>4 were going to be based on appraised value of</p> <p>5 certain specified real estate assets.</p> <p>6 There was a -- they were also going</p> <p>7 to pay another \$250 million. They were going</p> <p>8 to, under the Asset Purchase Agreement, they</p> <p>9 would pay, as I testified earlier, under</p> <p>10 certain circumstances if they sold certain</p> <p>11 portfolio assets within one year and netted a</p> <p>12 profit as described in the Asset Purchase</p> <p>13 Agreement, they would share some of that</p> <p>14 profit with Lehman Brothers.</p> <p>15 They were also taking on various</p> <p>16 liabilities, including liabilities related to</p> <p>17 the portfolio, part of the portfolio positions</p> <p>18 that they were taking. They were agreeing to</p> <p>19 pay certain cure costs, the amount of which --</p> <p>20 whatever they turned out to be. And they also</p> <p>21 were agreeing to pay certain compensation</p> <p>22 amounts under the Asset Purchase Agreement.</p> <p>23 I may be forgetting some things.</p> <p>24 If I had the the Agreement in front of me, I'd</p> <p>25 be happy to go through it and take another</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 look.</p> <p>3 <b>Q. I understand, sir, it is your</b></p> <p>4 <b>general recollection.</b></p> <p>5 <b>The deal, as it finally closed, did</b></p> <p>6 <b>it change the structure you just described?</b></p> <p>7 MR. MORAG: With respect to the</p> <p>8 purchase price?</p> <p>9 MR. GAFFEY: Yes.</p> <p>10 A. Yes.</p> <p>11 <b>Q. How did it change?</b></p> <p>12 A. It changed -- first of all, the</p> <p>13 provision that required Barclays, under some</p> <p>14 scenarios, to share some of the potential</p> <p>15 profit on the -- if they sold within a year.</p> <p>16 I think it was a year, it might have been six</p> <p>17 months. If they sold within a fixed period</p> <p>18 certain of the positions that they assumed</p> <p>19 they made a profit, some portion of that would</p> <p>20 go to Lehman Brothers.</p> <p>21 That provision was dropped. So</p> <p>22 that was a change in one of the price related</p> <p>23 provisions. And -- I remember the other.</p> <p>24 The other thing -- I don't know if</p> <p>25 I would call it a price provision or not, but</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 it involved money; cash.</p> <p>3 And the original agreement, the</p> <p>4 Asset Purchase Agreement, had a concept of</p> <p>5 retained cash, if I remember the defined term,</p> <p>6 which provided that that amount of cash would</p> <p>7 be among the assets that Barclays would be</p> <p>8 receiving as part of the acquisition. And</p> <p>9 that was -- that was dropped subsequently from</p> <p>10 the -- from the transaction.</p> <p>11 <b>Q. Anything else that you remember in</b></p> <p>12 <b>terms of changes between the transaction, the</b></p> <p>13 <b>pricing provisions of the transaction on</b></p> <p>14 <b>September 16th, and the provisions as the deal</b></p> <p>15 <b>ultimately closed?</b></p> <p>16 MR. HUME: Objection to the extent</p> <p>17 it calls for an interpretation of the</p> <p>18 contract.</p> <p>19 MR. MORAG: At this point, I'm</p> <p>20 going to ask you to show it to him.</p> <p>21 A. It would be helpful to see the</p> <p>22 Clarification Letter to know that. Let me</p> <p>23 just for one second.</p> <p>24 Let me just... none that occurs to</p> <p>25 me without looking at the contract.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>Q. Let me show you what's previously</b></p> <p>3 <b>been marked as Deposition Exhibit 1, a copy of</b></p> <p>4 <b>the Asset Purchase Agreement.</b></p> <p>5 <b>Have you had a chance to review</b></p> <p>6 <b>this prior to your deposition today, reviewed</b></p> <p>7 <b>it recently?</b></p> <p>8 A. Yes.</p> <p>9 <b>Q. Would you take a look at page 14 of</b></p> <p>10 <b>that exhibit, sir, Section 3.3 of the</b></p> <p>11 <b>Agreement.</b></p> <p>12 A. Yes.</p> <p>13 <b>Q. That provision, "Adjustment to cash</b></p> <p>14 <b>amount," is that the provision you've been</b></p> <p>15 <b>talking about when you talked about potential</b></p> <p>16 <b>payments to Lehman depending on the values of</b></p> <p>17 <b>certain assets after a year?</b></p> <p>18 A. Let me just reread it.</p> <p>19 <b>Q. Sure.</b></p> <p>20 MR. MORAG: Objection.</p> <p>21 <b>Q. Don't take my explanation. But I</b></p> <p>22 <b>just want to know if that's the agreement,</b></p> <p>23 <b>that's the provision you've been talking</b></p> <p>24 <b>about?</b></p> <p>25 MR. MORAG: Object to the</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 characterization of it, but you can</p> <p>3 answer if that's the provision you were</p> <p>4 referring to earlier.</p> <p>5 (Witness reviewing document.)</p> <p>6 A. Yes.</p> <p>7 <b>Q. Now, having taken a look at</b></p> <p>8 <b>Section 3.3 of the Asset Purchase Agreement,</b></p> <p>9 <b>and directing your attention again to</b></p> <p>10 <b>Paragraph 4 of your Declaration, could you</b></p> <p>11 <b>tell me, sir, whether Section 3.3 is a</b></p> <p>12 <b>post-closing purchase price adjustment</b></p> <p>13 <b>provision relating to valuation of transferred</b></p> <p>14 <b>assets and liabilities, as you described it in</b></p> <p>15 <b>Paragraph 4?</b></p> <p>16 MR. HUME: Objection. Asked and</p> <p>17 answered.</p> <p>18 MR. MORAG: You can answer.</p> <p>19 A. No, I don't think so.</p> <p>20 <b>Q. Why not?</b></p> <p>21 A. Because if you were going to do it</p> <p>22 based on a valuation, you would have valued</p> <p>23 all of the -- those -- at least all of the</p> <p>24 portfolio assets that are being -- all of the</p> <p>25 positions, and it would turn not on whether or</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 not Barclays in its complete discretion had or</p> <p>3 had not sold some, if not others, of those</p> <p>4 assets.</p> <p>5 <b>Q. Do you know if a balance sheet of</b></p> <p>6 <b>any kind was prepared in connection with the</b></p> <p>7 <b>Asset Purchase Agreement?</b></p> <p>8 MR. MORAG: Object to the form.</p> <p>9 A. I don't know whether I would</p> <p>10 characterize it as a balance sheet. There was</p> <p>11 a one-page piece of paper that somebody from</p> <p>12 Lehman Brothers went into the room late in the</p> <p>13 game, late in the -- you know, late that</p> <p>14 Tuesday. I don't remember what time, that had</p> <p>15 certain categories of assets other than</p> <p>16 liabilities on the -- on the -- on it, that</p> <p>17 was talked about previously and is referred to</p> <p>18 in one place in the Asset Purchase Agreement.</p> <p>19 <b>Q. Mr. Lewkow, I'm showing you what's</b></p> <p>20 <b>previously been marked as Exhibit 19.</b></p> <p>21 <b>Is that the one-page piece of paper</b></p> <p>22 <b>you just referred to?</b></p> <p>23 A. I recall that there was at least</p> <p>24 two versions of this that came in. And I</p> <p>25 think both were initialled by Berkenfeld, that</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 came and went. So I'm not sure if this was --</p> <p>3 I don't remember the dating and the time of</p> <p>4 it.</p> <p>5 So whether this was the first or</p> <p>6 the second or some other version, I can't</p> <p>7 tell. But it looked generally like this, yes.</p> <p>8 <b>Q. Whether this is the particular one</b></p> <p>9 <b>you are referring to, it is a version of</b></p> <p>10 <b>Exhibit 19 that you were referring to; is that</b></p> <p>11 <b>correct?</b></p> <p>12 MR. MORAG: Object to the form.</p> <p>13 A. It is what I just said. It looks,</p> <p>14 in general terms, like what I am referring to.</p> <p>15 <b>Q. Have you seen this document before?</b></p> <p>16 A. I believe so. Again, I don't</p> <p>17 remember all the numbers on the page, and so I</p> <p>18 don't know whether -- which version this was.</p> <p>19 But certainly I have -- I believe I</p> <p>20 have seen this document at least recently.</p> <p>21 Whether I saw this version that night, I have</p> <p>22 less certainty.</p> <p>23 <b>Q. Do you know why Mr. Berkenfeld</b></p> <p>24 <b>signed the one-page piece of paper that you</b></p> <p>25 <b>mentioned?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 MR. MORAG: Objection. He's --</p> <p>3 MR. HUME: Objection. Calls for</p> <p>4 speculation.</p> <p>5 A. I can tell you what I recall him</p> <p>6 saying.</p> <p>7 <b>Q. Okay.</b></p> <p>8 A. I think he said something like --</p> <p>9 the Asset Purchase Agreement had been</p> <p>10 substantially finalized, and he had come into</p> <p>11 the room with this piece of paper or a version</p> <p>12 of this piece of paper, and there was some</p> <p>13 talk about -- that I don't remember very well,</p> <p>14 about the categories of assets and liabilities</p> <p>15 on this piece of paper.</p> <p>16 And he said, "Well, this is what</p> <p>17 we're talking about here. I'm going to</p> <p>18 initial it," or something like that.</p> <p>19 <b>Q. Did you ask him why he did that?</b></p> <p>20 <b>Why he said "This is what we're talking about,</b></p> <p>21 <b>I'm going to initial it"?</b></p> <p>22 A. No.</p> <p>23 <b>Q. Did the one-page piece of paper</b></p> <p>24 <b>that Mr. Berkenfeld initialled play any role</b></p> <p>25 <b>in the transaction?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1                   <b>-Lewkow-</b></p> <p>2           MR. MORAG: Objection to form.</p> <p>3           MR. HUME: Objection. Vague.</p> <p>4           A. As I mentioned, there is a</p> <p>5 provision in the compensation section that</p> <p>6 refers to this piece of paper or some version</p> <p>7 of it, yes.</p> <p>8           <b>Q. Was it your understanding that the</b></p> <p>9 <b>one-page piece of paper Mr. Berkenfeld signed</b></p> <p>10 <b>also guided the transaction to the extent the</b></p> <p>11 <b>value of portfolio of assets was concerned?</b></p> <p>12          MR. MORAG: Mr. Gaffey, I'm going</p> <p>13 to object. You keep using the word</p> <p>14 "signed," he keeps using the word</p> <p>15 "initialled."</p> <p>16          MR. GAFFEY: We are big boys. We</p> <p>17 both know it means he wrote on the</p> <p>18 document. Do you want me to say</p> <p>19 "initialled"?</p> <p>20          MR. MORAG: If you could.</p> <p>21          MR. GAFFEY: Sure. Can you read</p> <p>22 the question back?</p> <p>23 (Record read as follows:</p> <p>24 "Question: Was it your understanding</p> <p>25 that the one-page piece of paper</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2           Mr. Berkenfeld signed also guided the</p> <p>3 transaction to the extent the value of</p> <p>4 portfolio of assets was concerned?"</p> <p>5           <b>Q. Can you answer that question as if</b></p> <p>6 <b>I said "initialled"?</b></p> <p>7           A. I need to hear it again. I'm</p> <p>8 sorry.</p> <p>9           <b>Q. Let me rephrase it.</b></p> <p>10          The one-page piece of paper that</p> <p>11 Mr. Berkenfeld initialled, what role, if any,</p> <p>12 did that play in the transaction? Withdrawn.</p> <p>13          <b>Did the one-page piece of paper</b></p> <p>14 <b>that Mr. Berkenfeld initialled guide the</b></p> <p>15 <b>transaction with regard to the value of the</b></p> <p>16 <b>portfolio of assets transferred?</b></p> <p>17          MR. MORAG: Object to the form.</p> <p>18           A. I would not -- I don't know what</p> <p>19 you mean by "guide."</p> <p>20           <b>Q. Was it meant to instruct the drafts</b></p> <p>21 <b>people of the Asset Purchase Agreement as to</b></p> <p>22 <b>the value of the long position that was</b></p> <p>23 <b>transferred?</b></p> <p>24           A. The drafts people had already</p> <p>25 drafted the Agreement. I don't remember</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1                   <b>-Lewkow-</b></p> <p>2 exactly what the status was at the precise</p> <p>3 time. This was brought in. I don't think it</p> <p>4 influenced the drafting. If by the draftsmen</p> <p>5 you mean the lawyers from both sides who were</p> <p>6 involved in preparation of the document, the</p> <p>7 Asset Purchase Agreement, I don't believe this</p> <p>8 guided the drafting of the Agreement, no.</p> <p>9           <b>Q. Did anyone from Cleary Gottlieb</b></p> <p>10 <b>play any role in the preparation of this</b></p> <p>11 <b>document?</b></p> <p>12           A. No. To the best of my knowledge,</p> <p>13 no.</p> <p>14           <b>Q. Did anyone from Cleary Gottlieb</b></p> <p>15 <b>play any role in determining the values that</b></p> <p>16 <b>are shown on this document?</b></p> <p>17           A. No.</p> <p>18           <b>Q. Did anyone from Barclays</b></p> <p>19 <b>participate in the preparation of this</b></p> <p>20 <b>document?</b></p> <p>21           A. I don't believe, not to my</p> <p>22 knowledge.</p> <p>23           <b>Q. Did anyone from Barclays play any</b></p> <p>24 <b>role in determining the values shown on this</b></p> <p>25 <b>document?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2           A. I don't -- I don't know what that</p> <p>3 means. Other than as I testified previously</p> <p>4 and is set forth in my declaration, you can</p> <p>5 characterize that in any way you want. But</p> <p>6 other than that, I don't know of anything</p> <p>7 relative to the question.</p> <p>8           <b>Q. Would you take a look at</b></p> <p>9 <b>Paragraph 9 of your Declaration?</b></p> <p>10           A. Sure.</p> <p>11           <b>Q. Take the time you need to review</b></p> <p>12 <b>the paragraph to refresh yourself of its</b></p> <p>13 <b>contents.</b></p> <p>14           But my question is going to go to</p> <p>15 the portion that begins -- seven lines down --</p> <p>16 "While I was not present for the actual</p> <p>17 discussions between Barclays and Lehman</p> <p>18 Brothers traders..."</p> <p>19           A. Let me just reread it.</p> <p>20           <b>Q. Sure.</b></p> <p>21 (Witness reviewing document.)</p> <p>22           A. Yes?</p> <p>23           <b>Q. Now, to your knowledge, was the</b></p> <p>24 <b>document I have before you marked as</b></p> <p>25 <b>Exhibit 19, a product of the discussions</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>

1 **-Lewkow-**  
2 **between Barclays and Lehman traders that**  
3 **you're referring to in Paragraph 9 of your**  
4 **Declaration?**

5 MR. MORAG: Object to the form.

6 A. No. I -- I wouldn't -- I mean,  
7 I -- this was a Lehman Brothers document. I  
8 assume that as --

9 To the extent that Lehman Brothers,  
10 having listened to Barclays' views as to  
11 valuation may have changed their marks, as I  
12 believe they did, it may have reflected those  
13 judgments by Lehman as to the proper marking  
14 of assets or liabilities. But that's all.

15 **Q. Did you come to an understanding**  
16 **that Lehman changed its marks in response to**  
17 **Barclays' expression of concern that they were**  
18 **too high?**

19 A. It was my understanding that they  
20 had determined that they would change their  
21 marks.

22 MR. MORAG: By that, who are you  
23 referring to?

24 THE WITNESS: Lehman. The only one  
25 that was making marks was Lehman. It  
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1 **-Lewkow-**  
2 was their balance sheet.

3 **Q. From whom did you obtain that**  
4 **understanding? Can I just caution you, if it**  
5 **is a Barclays person, just tell me their name?**  
6 **I don't want to know the substance of the**  
7 **conversation.**

8 A. No, I understand that.

9 **Q. Yes.**

10 A. I don't remember the name. I have  
11 a recollection of someone being involved in  
12 those discussions coming into the room. I  
13 believe it was -- where lawyers and other  
14 folks from the other side were in the room and  
15 reported what I had characterized in my  
16 testimony a minute or two ago. But I don't  
17 remember the name of the individual from  
18 Barclays.

19 **Q. Do you know if Lehman did, in fact,**  
20 **change its marks?**

21 A. I have no way of knowing that.

22 **Q. Did you or anyone else from Cleary**  
23 **ever ask that question in the week**  
24 **beginning -- well, from Tuesday, September**  
25 **16th through the closing of the transaction on**  
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1 **-Lewkow-**  
2 **the 22nd?**  
3 A. No.  
4 **Q. Actually, will you turn to, in the**  
5 **Asset Purchase Agreement, which is Exhibit 1.**  
6 **If I can ask you, please, Mr. Lewkow, to turn**  
7 **to page 6, which contains the definition of**  
8 **"Purchased Assets."**

9 **And in particular, if you would**  
10 **take a look at subsection (d) of that**  
11 **definition.**

12 A. Yup.

13 **Q. Do you see there's a reference**  
14 **there to various categories of securities.**  
15 **Let met read it. "Government securities,**  
16 **commercial paper, corporate debt, corporate**  
17 **equity, exchange-traded derivatives and**  
18 **collateralized short-term agreements with a**  
19 **book value as of the date hereof of**  
20 **approximately \$70 billion (collectively 'long**  
21 **positions')." Do you see that?**

22 A. I do.

23 **Q. Where did the \$70 billion come from**  
24 **that was put into subsection (d) of the**  
25 **definition of "Purchased Assets"?**

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1 **-Lewkow-**

2 A. From Lehman.

3 **Q. Was it Barclays' understanding at**  
4 **the time that that was an accurate estimation**  
5 **of the book value of the described assets?**

6 MR. MORAG: Objection to form.

7 A. To my knowledge, it was Barclays'  
8 understanding that it represented what Lehman  
9 Brothers -- having considered the discussions  
10 I described earlier in terms of what they  
11 concluded, after hearing Barclays, was the  
12 proper mark to take on its balance sheet.  
13 That it reflected Lehman's conclusions.

14 **Q. Was the term "book value" used for**  
15 **a reason in subsection (d) in the definition**  
16 **of "Purchased Assets"?**

17 MR. HUME: Objection. Vague.

18 A. Who's -- yeah, whose reason?

19 **Q. Well, was it supposed to say**  
20 **"market value"?**

21 A. Not all assets on the balance sheet  
22 have a market value. There are -- it is my  
23 understanding. Again, I'm not an expert, a  
24 broker-dealer expert or a market expert or a  
25 valuation expert, but it is my understanding

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<p>1 -Lewkow-</p> <p>2 that for some positions where there is no</p> <p>3 active market, that other -- other things go</p> <p>4 into how a broker-dealer is supposed to mark</p> <p>5 their -- their valuation from an accounting</p> <p>6 standpoint.</p> <p>7 <b>Q. Was it a considered choice of the</b></p> <p>8 <b>people who drafted the Asset Purchase</b></p> <p>9 <b>Agreement to use the phrase "book value"</b></p> <p>10 <b>instead of some other phrase such as "market</b></p> <p>11 <b>value"?</b></p> <p>12 MR. HUME: Objection. Vague and</p> <p>13 lacks foundation.</p> <p>14 A. Can I have the question read back,</p> <p>15 please?</p> <p>16 (Record read.)</p> <p>17 A. I don't know how to answer that</p> <p>18 question, final question.</p> <p>19 Every -- we tried as a group, Weil</p> <p>20 Gotshal, Simpson Thacher, Sullivan &amp; Cromwell,</p> <p>21 Cleary Gottlieb, tried to do the best we could</p> <p>22 in drafting this Agreement under</p> <p>23 extraordinarily unusual, difficult</p> <p>24 circumstances.</p> <p>25 I do recall that, that this was one</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 of those final changes that was added in</p> <p>3 handwriting, if I had the other version of the</p> <p>4 Agreement. And somebody, I believe on</p> <p>5 Lehman's side of the table said, suggested we</p> <p>6 add in words such as -- to categorize that</p> <p>7 what we were talking about were, you know, a</p> <p>8 disfunction of assets. And it was for that</p> <p>9 purpose that it was referenced.</p> <p>10 And I believe that it was first</p> <p>11 suggested -- and again, I don't know from</p> <p>12 whom, it might have been a Lehman person. It</p> <p>13 might have been one of their lawyers. Said,</p> <p>14 let's say, with a -- you know, with a</p> <p>15 marking -- with marks of 70 billion, or some</p> <p>16 words of that sort.</p> <p>17 And some lawyer -- again, I don't</p> <p>18 know on which side. Because this was all</p> <p>19 being done in group session issue -- said,</p> <p>20 "Well, should we use the word" -- "from a</p> <p>21 legal, instead of saying 'marks', should we</p> <p>22 use the word 'book value'?"</p> <p>23 And that's the word that went in.</p> <p>24 But I don't think people were trying to draw a</p> <p>25 distinction between book value and marks, at</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 least from what this lawyer believed, the</p> <p>3 lawyer from Weil, understood "book value" to</p> <p>4 mean in the context of financial assets held</p> <p>5 by a broker-dealer.</p> <p>6 <b>Q. Did anyone from the Barclays side</b></p> <p>7 <b>of the table -- by that I'm including Barclays</b></p> <p>8 <b>personnel or Cleary, ask for or get any</b></p> <p>9 <b>information to indicate whether the value of</b></p> <p>10 <b>\$70 billion described in subsection (d) was an</b></p> <p>11 <b>accurate description of Lehman's book value</b></p> <p>12 <b>for those classes of securities?</b></p> <p>13 MR. MORAG: Object to the form.</p> <p>14 A. As I told you, as I believe I</p> <p>15 testified, I believe we were in a group told</p> <p>16 that Lehman was going to remark certain</p> <p>17 portfolio assets to reduce them. I assumed</p> <p>18 that Lehman had done -- it never occurred to</p> <p>19 me, when they talked about "marks", I assumed</p> <p>20 that it reflected whatever Lehman had,</p> <p>21 therefore, done. And therefore, book value</p> <p>22 likewise.</p> <p>23 <b>Q. So from what we talked about so</b></p> <p>24 <b>far, would it be fair to say that the</b></p> <p>25 <b>understanding was that Lehman negotiated to</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>reduce its marks?</b></p> <p>3 MR. MORAG: Object to the form.</p> <p>4 A. I'm not going to characterize. I</p> <p>5 have -- you're trying to characterize what I</p> <p>6 testified to. I stand by the accuracy of my</p> <p>7 testimony. But I would not -- I would not --</p> <p>8 I would not call that "negotiated." It is</p> <p>9 what it is.</p> <p>10 <b>Q. Mr. Lewkow, don't get me wrong.</b></p> <p>11 <b>I'm not suggesting any lack of credibility of</b></p> <p>12 <b>your testimony. What I'm looking for is your</b></p> <p>13 <b>best memory of what people talked about at the</b></p> <p>14 <b>time?</b></p> <p>15 A. I've given you my best.</p> <p>16 <b>Q. Do you remember anything else in</b></p> <p>17 <b>terms of discussions concerning the use of the</b></p> <p>18 <b>phrase "book value" in subsection (d)?</b></p> <p>19 A. No.</p> <p>20 <b>Q. Let me show you what's previously</b></p> <p>21 <b>been marked as Exhibit 518. Take a look at</b></p> <p>22 <b>the document. My questions will go to the</b></p> <p>23 <b>notations on page 7.</b></p> <p>24 MR. HUME: Page which?</p> <p>25 MR. MORAG: 7. Of the document</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 itself, not the Bates number.</p> <p>3 A. Yup?</p> <p>4 <b>Q. And you referred a few moments ago,</b></p> <p>5 <b>Mr. Lewkow, to the addition of the phrase</b></p> <p>6 <b>"book value" in a handwritten note, in a</b></p> <p>7 <b>handwritten annotation. Is this the document</b></p> <p>8 <b>that you were remembering?</b></p> <p>9 A. It appears to be, yes.</p> <p>10 <b>Q. At least I wasn't clear as to</b></p> <p>11 <b>whether you have a memory as to which side of</b></p> <p>12 <b>the negotiations added that phrase. Do you</b></p> <p>13 <b>recall whether it was Lehman or Barclays, or</b></p> <p>14 <b>do you not recall either side?</b></p> <p>15 A. As I testified, it was a suggestion</p> <p>16 of someone on the Lehman side that words of</p> <p>17 that nature be added, yes.</p> <p>18 <b>Q. Do you recall who on the Lehman</b></p> <p>19 <b>side?</b></p> <p>20 A. No. I believe it was not one of</p> <p>21 their outside lawyers. I believe it was</p> <p>22 somebody from Lehman itself, but I have no</p> <p>23 recollection who.</p> <p>24 <b>Q. If you can turn back. Actually, I</b></p> <p>25 <b>created kind of a document mess in front of</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>you.</b></p> <p>3 A. It is all right.</p> <p>4 <b>Q. Why don't you fold those up? And</b></p> <p>5 <b>let go back to your Declaration for a minute.</b></p> <p>6 A. Sure.</p> <p>7 (Witness complying.)</p> <p>8 <b>Q. Actually, just before we go back to</b></p> <p>9 <b>your Declaration?</b></p> <p>10 MR. GAFFEY: Bridgett, can I have</p> <p>11 25, please?</p> <p>12 <b>Q. Mr. Lewkow, I put before you a copy</b></p> <p>13 <b>of what previously has been marked as</b></p> <p>14 <b>Exhibit 25.</b></p> <p>15 <b>You referred a few moments ago to a</b></p> <p>16 <b>Clarification Letter. Is that the</b></p> <p>17 <b>Clarification Letter to which you were</b></p> <p>18 <b>referring?</b></p> <p>19 A. Yes. It appears to be.</p> <p>20 <b>Q. What was the purpose of the</b></p> <p>21 <b>Clarification Letter?</b></p> <p>22 A. The Clarification Letter was, as</p> <p>23 set forth in the opening paragraph, "To</p> <p>24 clarify the intent of the parties with respect</p> <p>25 to certain provisions of the Asset Purchase</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 Agreement, supplement in certain respects the</p> <p>3 agreements of the parties stated therein, and</p> <p>4 amend the Asset Purchase Agreement in certain</p> <p>5 respects."</p> <p>6 <b>Q. Now, are there particular portions</b></p> <p>7 <b>of the Agreement that were amended or are</b></p> <p>8 <b>there particular portions that were</b></p> <p>9 <b>supplemented or are there particular portions</b></p> <p>10 <b>that were clarified?</b></p> <p>11 MR. MORAG: Objection to the form.</p> <p>12 MR. HUME: Objection to the form</p> <p>13 and that it calls for an intersection</p> <p>14 of the agreement. And generally</p> <p>15 Barclays will object to the extent you</p> <p>16 ask the witness to give legal</p> <p>17 interpretations of the contract as</p> <p>18 revealing privilege.</p> <p>19 A. The answer is -- the document is</p> <p>20 the document. No one ever tried to say, all</p> <p>21 right, this clause is a supplement; this</p> <p>22 clause is an amendment; this clause is -- they</p> <p>23 are what they are. Certain -- certain things</p> <p>24 did clarify; certain things amended. No</p> <p>25 one -- there was no reason -- there was no</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 effort to allocate into buckets in this</p> <p>3 document.</p> <p>4 <b>Q. Do you recall if the use of the</b></p> <p>5 <b>word "amend" was a deliberate drafting choice?</b></p> <p>6 MR. MORAG: Objection.</p> <p>7 MR. GAFFEY: That's a bad question.</p> <p>8 Let me withdraw that question.</p> <p>9 <b>Q. Do you recall if the word "amend"</b></p> <p>10 <b>was added at some point during exchanging</b></p> <p>11 <b>drafts of the Clarification Letter?</b></p> <p>12 A. I would need to see all the drafts</p> <p>13 to be sure. But my recollection is yes.</p> <p>14 <b>Q. Okay. I'm going to show you the</b></p> <p>15 <b>draft, so I'm not going to ask you to</b></p> <p>16 <b>speculate and pinpoint.</b></p> <p>17 <b>Do you recall any discussions</b></p> <p>18 <b>between the party, that is between Lehman and</b></p> <p>19 <b>Barclays or their representatives, about</b></p> <p>20 <b>adding the word "amend" to the Clarification</b></p> <p>21 <b>Letter?</b></p> <p>22 A. I have a vague recollection that</p> <p>23 with the very first draft of the Clarification</p> <p>24 Letter, which was prepared very quickly by</p> <p>25 someone -- and I don't know which side --</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 after the Asset Purchase Agreement had been</p> <p>3 signed and filed with the Court on Wednesday</p> <p>4 morning, that the original first draft was a</p> <p>5 page or two and it clearly was truly nothing</p> <p>6 other than clarification. And so that the</p> <p>7 first draft did not use the word "amendment."</p> <p>8 At some later point, as things got</p> <p>9 more complicated and things were happening, it</p> <p>10 became -- there was discussion that we should</p> <p>11 add the word "amend." That is my</p> <p>12 understanding.</p> <p>13 <b>Q. Do you recall who was involved in</b></p> <p>14 <b>those discussions?</b></p> <p>15 A. People from Cleary Gottlieb and</p> <p>16 people from Weil Gotshal, and probably Simpson</p> <p>17 Thacher.</p> <p>18 <b>Q. Do you have a more specific memory</b></p> <p>19 <b>of which people? I know it was a pretty</b></p> <p>20 <b>tumultuous week. But do you recall who in</b></p> <p>21 <b>particular was involved in those discussions?</b></p> <p>22 A. It was more in the direct</p> <p>23 conversations between -- I think most of the</p> <p>24 conversations on the Clarification Letter were</p> <p>25 on Barclays side between some combination,</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 Duane McLaughlin, David Leinwand; Robert</p> <p>3 Davis; some cases me, but not primarily me;</p> <p>4 and various people from Weil Gotshal which I</p> <p>5 believe included Robert Messineo, I may be</p> <p>6 mispronouncing his name, David Murgio, maybe</p> <p>7 Tom Roberts and I'm not sure who else.</p> <p>8 <b>Q. Do you know if Harvey Miller was</b></p> <p>9 <b>involved in those discussions?</b></p> <p>10 A. Which discussions? You started --</p> <p>11 I probably went too far in answering your</p> <p>12 question.</p> <p>13 <b>Q. I don't know who led who astray</b></p> <p>14 <b>there.</b></p> <p>15 <b>The question, the issue is what you</b></p> <p>16 <b>talked about a minute ago --</b></p> <p>17 A. The word "amendment"?</p> <p>18 <b>Q. Yes. That it became more complex</b></p> <p>19 <b>and I decided to add the word "amendment,"</b></p> <p>20 <b>whether Mr. Harvey Miller was involved in</b></p> <p>21 <b>those discussions.</b></p> <p>22 A. I don't think -- I don't know what</p> <p>23 Mr. Miller was doing talking internally with</p> <p>24 his colleagues or with his clients. Did he</p> <p>25 participate in the exact wording of that? I</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 don't know. I do have a distinct recollection</p> <p>3 of him describing to the Court at the sale</p> <p>4 hearing that Friday evening that there were</p> <p>5 major changes in the deal.</p> <p>6 So I can't imagine -- I don't want</p> <p>7 to speculate. I do not recall specifically</p> <p>8 whether he was involved in adding the word</p> <p>9 "amend" in that clause.</p> <p>10 <b>Q. Was the Clarification Letter meant</b></p> <p>11 <b>to memorialize those major changes in the</b></p> <p>12 <b>deal?</b></p> <p>13 MR. MORAG: Object to form.</p> <p>14 A. I'm picking up the Clarification</p> <p>15 Letter. It was made to both supplement,</p> <p>16 clarify and amend the Asset Purchase</p> <p>17 Agreement. And it was intended to be</p> <p>18 consistent with what the Court had been told</p> <p>19 this Friday evening.</p> <p>20 <b>Q. Were you yourself present in court</b></p> <p>21 <b>on the sale hearing on the 19th?</b></p> <p>22 A. I was.</p> <p>23 MR. MORAG: Yes.</p> <p>24 MR. GAFFEY: Yes. Okay.</p> <p>25 <b>Q. The Clarification Letter,</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>Exhibit 25, sets forth certain changes in the</b></p> <p>3 <b>definition of "Purchased Assets" from the</b></p> <p>4 <b>original Asset Purchase Agreement; is that</b></p> <p>5 <b>correct?</b></p> <p>6 MR. HUME: Object to the form.</p> <p>7 A. Can I look at --</p> <p>8 <b>Q. Sure.</b></p> <p>9 A. -- both at the Clarification Letter</p> <p>10 and the Asset Purchase Agreement?</p> <p>11 <b>Q. Look at whatever you need to look</b></p> <p>12 <b>at.</b></p> <p>13 A. Thank you.</p> <p>14 (Witness reviewing document.)</p> <p>15 A. Yes.</p> <p>16 <b>Q. While you were present in court,</b></p> <p>17 <b>was Judge Peck told about the changes in the</b></p> <p>18 <b>definition of "Purchased Assets"?</b></p> <p>19 MR. MORAG: Object to the form.</p> <p>20 A. You can read the transcript as well</p> <p>21 as I can, and I think it speaks for itself.</p> <p>22 I think that what the judge was</p> <p>23 told was about the substantive changes in the</p> <p>24 deal, major changes in the deal that had been</p> <p>25 orally agreed to, is my understanding, by</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 representatives of Lehman and Barclays in a</p> <p>3 couple of hours preceding the beginning of the</p> <p>4 court hearing.</p> <p>5 So it does not mean that -- as the</p> <p>6 Court was well aware and as the Court noted,</p> <p>7 that he did not have the document. The</p> <p>8 document did not yet exist but, you know,</p> <p>9 major changes were described by Mr. Miller and</p> <p>10 Ms. Fife to the Court.</p> <p>11 <b>Q. And in Cleary Gottlieb's view at</b></p> <p>12 <b>the time, were the changes as described by</b></p> <p>13 <b>Mr. Miller and Ms. Fife to the Court at the</b></p> <p>14 <b>hearing, accurate and complete?</b></p> <p>15 MR. MORAG: Object to the form.</p> <p>16 A. Yes.</p> <p>17 <b>Q. Were any changes to the transaction</b></p> <p>18 <b>discussed or agreed upon after the sale had</b></p> <p>19 <b>been concluded, that were incorporated in the</b></p> <p>20 <b>Clarification Letter?</b></p> <p>21 MR. MORAG: Object to the form.</p> <p>22 A. Well, one -- one thing that was</p> <p>23 changed that I recall related to the</p> <p>24 residential mortgages, the so-called RESIs.</p> <p>25 The original Asset Purchase</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 Agreement had -- contained a provision that</p> <p>3 treated the residential mortgages differently</p> <p>4 than any other category of assets and</p> <p>5 provided -- can I look at the Agreement?</p> <p>6 <b>Q. Sure. I think you might be looking</b></p> <p>7 <b>for 1(e) in the definition of "Purchased</b></p> <p>8 <b>Assets"?</b></p> <p>9 A. He knows where all the clauses are</p> <p>10 here.</p> <p>11 <b>Q. Page 6.</b></p> <p>12 <b>(Witness reviewing document.)</b></p> <p>13 A. Right. So the original Asset</p> <p>14 Purchase Agreement provided that the Purchased</p> <p>15 Assets that Barclays would be acquiring</p> <p>16 included a 50 percent interest in the</p> <p>17 positions in the residential mortgage</p> <p>18 securities.</p> <p>19 At some point on Thursday, late</p> <p>20 Thursday or early Friday -- I have no</p> <p>21 recollection of when it was precisely -- an</p> <p>22 amendment No. 1 to the Asset Purchase</p> <p>23 Agreement was executed by the parties that was</p> <p>24 addressed -- was done to address a problem.</p> <p>25 There was real uncertainty as to</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 whether the deal could be completed because of</p> <p>3 issues that DTC wanted assurances that it was</p> <p>4 being -- it would be protected in certain</p> <p>5 respects, the details of which I have -- was</p> <p>6 not involved in, and that I don't recall great</p> <p>7 detail.</p> <p>8 But the amendment instead provided</p> <p>9 that the 50 percent interest that Lehman was</p> <p>10 going to keep, as I recall, was instead going</p> <p>11 to be delivered -- and I don't remember the --</p> <p>12 I have to look at amendment No. 1, but it was</p> <p>13 going to be delivered instead to DTC. And if</p> <p>14 at the end of some period and the like it</p> <p>15 turned out that to secure up to, I believe,</p> <p>16 250 million. But again, I would need to look</p> <p>17 at amendment No. 1.</p> <p>18 But that to the extent that there</p> <p>19 was some excess available, it would go back to</p> <p>20 Lehman. So that Lehman still might end up</p> <p>21 having some interest in the RESIs to the</p> <p>22 extent that DTC did not need them to protect</p> <p>23 it in connection with the Lehman positions.</p> <p>24 The Court was, as I recall in the</p> <p>25 court hearing, Mr. Miller and Ms. Fife made</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 reference to this provision.</p> <p>3 It turned out that the parties</p> <p>4 learned at some point, Friday or Saturday, I</p> <p>5 believe, that, in fact, the so-called</p> <p>6 residential real estate mortgage securities or</p> <p>7 RESIs, that Lehman didn't have such positions</p> <p>8 available to transfer to Barclays in the first</p> <p>9 place. So there were no such -- and the</p> <p>10 reasons were -- and I really don't recall. I</p> <p>11 don't know if I ever knew in detail.</p> <p>12 Some of those positions had already</p> <p>13 been traded; they no longer owned them; some,</p> <p>14 they may have been pledged to third parties;</p> <p>15 some would have involved, to the extent there</p> <p>16 were separate double counting with other</p> <p>17 securities that were getting outside this</p> <p>18 provision. And accordingly, there were no</p> <p>19 RESIs of the sort that the Court had been told</p> <p>20 about by Mr. Miller or Ms. Fife in the sale</p> <p>21 hearing. So that provision was eliminated in</p> <p>22 the Clarification Letter which basically</p> <p>23 amended the agreement to unwind amendment No.</p> <p>24 1.</p> <p>25 <b>Q. Just so I'm clear we don't have a</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>



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<p>1                   <b>-Lewkow-</b> 2   <b>disconnect between my question and your</b> 3   <b>answer. My question went to changes that were</b> 4   <b>made after the sale hearing ended.</b> 5           <b>Was that a change that was made</b> 6   <b>after the sale hearing ended?</b> 7           A. I believe so. Because as I said, 8   as I testified, Ms. Fife or Mr. Miller had 9   said, had described the state of the Asset 10   Purchase Agreement as amended by amendment No. 11   1 in the sale hearing. And this Clarification 12   Letter had the provisions that I just 13   described and for the reasons I described. 14           MR. MORAG: I need a bathroom break 15   if that's -- 16           MR. GAFFEY: I can't hear you. 17           MR. MORAG: Bathroom break. 18           MR. GAFFEY: Perfect time. 19           (Whereupon, a short recess was 20   taken from 11:22 a.m. to 11:35 a.m.) 21   BY MR. GAFFEY: 22           <b>Q. Mr. Lewkow, I put in the top of the</b> 23   <b>other pile of documents you have in front of</b> 24   <b>you what we previously marked as Exhibit 24,</b> 25   <b>First Amendment to the Asset Purchase</b>           TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2   <b>Agreement.</b> 3           <b>Is that the first amendment you</b> 4   <b>were referring to before the break?</b> 5           A. Yes, it is. 6           <b>Q. And that was superceded by the</b> 7   <b>Clarification Letter?</b> 8           A. Yes. 9           <b>Q. Were there any other changes to the</b> 10   <b>transaction made after the conclusion of the</b> 11   <b>sale hearing that are reflected in the</b> 12   <b>Clarification Letter?</b> 13           MR. MORAG: Object to the form. 14           A. The Clarification Letter was not -- 15   I can't deal with words like "after". 16           The Clarification Letter didn't 17   exist at the time of the court hearing. The 18   Clarification Letter did what it did; trying 19   to implement what the Court had been told as 20   well as the clarifications that needed to be 21   made. 22           And the example I gave you before 23   was different from what the Court had been 24   told to the disadvantage, I might add, to 25   Barclays because we had at the time of the           TSG Reporting - Worldwide   877-702-9580</p>
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<p>1                   <b>-Lewkow-</b> 2   Asset Purchase Agreement and at the time of 3   amendment No. 1 and at the time Weil Gotshal 4   described the transaction, changes to the 5   transaction that had been made. And when they 6   described that to the Court, they had believed 7   and Barclays had believed that there was a 8   separate pool available of residential 9   mortgages that over and above other assets 10   Barclays was getting would -- 50 percent of 11   the value of which would be something Barclays 12   was getting. 13           That was what the Court was told. 14   It turned out there weren't any separately 15   identifiable residential assets, residential 16   mortgage asset, RESIs. And so that -- that 17   was a change to reflect the fact that Barclays 18   was not getting something that it had 19   bargained for. But I don't know what you mean 20   by changes after the sale hearing. 21           <b>Q. Were there any other changes made</b> 22   <b>to reflect facets of the deal that were</b> 23   <b>different from what the Court had been told,</b> 24   <b>apart from this issue you told me about the</b> 25   <b>RESIs?</b>           TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2   MR. MORAG: Objection to form. The 3   feed is not coming through. 4           (Discussion off the record.) 5           (Record read as follows: 6   "Question: Were there any other 7   changes made to reflect facets of the 8   deal that were different from what the 9   Court had been told, apart from this 10   issue you told me about the RESIs?") 11           MR. MORAG: Object to the form. 12           A. I'm struggling. I'm not sure I can 13   answer it. Can I hear it one more time? 14           (Record read as follows: 15   "Question: Were there any other 16   changes made to reflect facets of the 17   deal that were different from what the 18   Court had been told, apart from this 19   issue you told me about the RESIs.") 20           A. Do I recall any changes to the deal 21   as they -- other than as I testified, any 22   changes to the deal that were -- from what the 23   Court, the totality of what the Court had been 24   told about the deal as a result of both the 25   Asset Purchase Agreement, the presentations,           TSG Reporting - Worldwide   877-702-9580</p>

1 -Lewkow-  
2 the Wednesday hearing and the Friday hearing,  
3 I don't recall any changes to the deal after  
4 that, you know, at this -- at this -- at this  
5 time.

6 **Q. Take a look, if you would,**  
7 **Mr. Lewkow at Paragraph 1, and tell me if**  
8 **there are changes to the definition of**  
9 **"Purchased Assets" affected by the**  
10 **Clarification Letter, changes to the**  
11 **definition from the Asset Purchase Agreement?**

12 MR. MORAG: You're asking him --

13 A. Yes.

14 MR. MORAG: -- the Clarification  
15 Letter?

16 A. Yes.

17 MR. MORAG: The last thing --

18 A. The answer is yes. There was a  
19 change in the definition, that's correct.

20 **Q. Do you know if the change in the**  
21 **definition of "Purchased Assets" was brought**  
22 **to the Court's attention?**

23 A. There was --

24 MR. MORAG: Object to the form.

25 A. The Court was told about the

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1 -Lewkow-  
2 substance of the deal. The Court was not told  
3 about clause, actual clause Y or clause Z and  
4 the like. So I can't answer that question  
5 other than to say, you know, you can read the  
6 transcript and I do not believe the words  
7 anyone said, and so such and such a clause or  
8 such and such a definition will be  
9 appropriately changed. That's not the way the  
10 hearing went.

11 **Q. So, for example, no one, to your**  
12 **knowledge, told the Court that the definition**  
13 **of "Purchased Assets" would be changed to now**  
14 **include securities owned by LBI and**  
15 **transferred to Purchaser or its affiliates**  
16 **under the Barclays Repurchase Agreement? I'm**  
17 **referring to Paragraph 1A, subsection (ii).**

18 MR. MORAG: Objection to form.

19 A. To the extent that -- a couple of  
20 things. First of all, that was not -- I do  
21 not believe that was a change in the deal.  
22 Barclays had agreed, with certain specified  
23 exception, to acquire all of the assets used  
24 in the business. Who financed those assets at  
25 a given point in time I don't think is

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1 -Lewkow-  
2 relevant to that question.

3 At the time the Asset Purchase  
4 Agreement was signed, it's my understanding  
5 that, you know, a lot of the assets were in  
6 the form -- were being financed overnight by  
7 the Federal Reserve pursuant to a repo.

8 At some point, Thursday or the  
9 like, Barclays had taken the fed out of the  
10 repo and provided the financing. But it was  
11 the same -- or it should have been, if the  
12 assets had been there as had been thought.  
13 But those assets, the fact that we added a  
14 reference to "repo" doesn't change whether the  
15 substance of the transaction changed.

16 **Q. Was there a reason that that**  
17 **particular phrase was added to the**  
18 **Clarification Letter then?**

19 MR. MORAG: Objection. What  
20 particular phrase?

21 A. I think you're going to have to be  
22 more specific.

23 **Q. Well, was there discussion back and**  
24 **forth between the parties about putting that**  
25 **language in the Clarification Letter,**

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1 -Lewkow-  
2 **referring to the repo assets?**

3 A. Can you point me to the exact  
4 language, please?

5 **Q. Paragraph 1(a)(ii)(A), "The**  
6 **securities owned by LBI and transferred to**  
7 **Purchaser or its affiliates under the Barclays**  
8 **Repurchase Agreement, as defined below, as**  
9 **specified on Schedule A previously delivered**  
10 **by Seller and accepted by Purchaser." That**  
11 **language.**

12 A. There were, as you know, a number  
13 of drafts that were circulated of the  
14 Clarification Letter. And my recollection is  
15 that at some point, as lawyers working on the  
16 Clarification Letter first learned and then  
17 focused on the fact that a lot, most but not  
18 all of the assets had been in the -- referred  
19 to in the definition of, I believe, "Long  
20 positions" in the Asset Purchase Agreement,  
21 were now -- had been financed by Barclays at  
22 the Feds' request and were in the repo, some  
23 lawyer -- and I don't remember whether it was  
24 initially from Weil Gotshal or Cleary  
25 Gottlieb, but there was agreement that it made

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-Lewkow-

sense to refer to the repo in this context.

**Q. Do you recall when it was that the lawyers first learned that assets that had been originally described in the long positions were, in fact, in the repo? When did that happen?**

MR. MORAG: Object to the form.

A. Yeah, I think -- first of all, I can't answer for all lawyers. That would include the Weil Gotshal lawyers and other lawyers on behalf of...

As to Cleary Gottlieb, at some point I believe, at least one of my colleagues that Thursday had heard that there had been -- that Barclays had extend -- provided repo financing to Barclays. I'm not sure. It is my understanding none of the details, we had not been involved in that at all. But it was mentioned, and we learned more about it on Friday and over the weekend.

But even as -- even as of the Court hearing we knew very little about it.

**Q. Did there come a time when you learned that the Repurchase Agreement had been**

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-Lewkow-

**terminated by Barclays?**

MR. MORAG: Object to the form.

A. There came a time when I learned -- when I -- when I learned that -- I'm not sure how I can answer, whether I can answer this without talking about a privileged conversation. Can I have...

**Q. Absolutely. Just before you talk to your lawyers, I'm focusing on the timing here. When did you learn it? We will tread carefully so that --**

A. When did I learn it requires -- I have to deal with your characterization. Can I hear the question again?

**Q. Let me put a question, and then if you need to consult, you can do that.**

A. Sure.

**Q. The question is: Did there come a time when you learned that the Repurchase Agreement had been terminated by Barclays?**

A. There came --

MR. MORAG: Objection to form.

MR. HUME: I will object and instruct you not to answer to the

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-Lewkow-

extent it would reveal a privilege from Barclays.

MR. GAFFEY: As to when?

MR. HUME: Well, you assumed when --

MR. GAFFEY: It is attorney --

MR. HUME: It was terminated. What does terminated mean?

MR. GAFFEY: It means ended.

A. It's a legal... If you want to ask the question -- can I talk to counsel for Barclays and my counsel?

**Q. Sure. Absolutely.**

**(Whereupon, a recess was taken from 11:49 a.m. to 11:52 a.m.)**

A. Before the break you asked me a question about did there come a time of learning about the termination of the repo.

Of course, the repo did terminate, as I understand it, when we closed on Monday, but I assume that's not what you're asking.

**Q. It is not.**

A. There did come a time over the weekend, I don't recall whether it was

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-Lewkow-

Saturday or Sunday, where we did learn -- I think I was reminded in preparing for the deposition, that it was -- we initially learned it when we were copied, or not copied and then forwarded on an e-mail from Sullivan & Cromwell who was co-counsel with us for Barclays, and/or to -- to Weil, that there had been an inadvertent notice given to Barclays by folks in the -- I don't know who, but someone at Barclays had sent a notice of termination of the repo at some point, I believe late Friday, and that that was done in error and should be undone.

So if that's what you're asking about, you've heard what my recollection is.

**Q. It is. Let me show you what's previously been marked as Exhibit 27.**

**Have you seen that document before, sir?**

**(Witness reviewing document.)**

A. No, I don't believe I have.

**Q. You learned about the inadvertent termination of the repo over the weekend; is that right?**

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<p>1                   <b>-Lewkow-</b> 2           A. Yes. 3           <b>Q. Was it the Saturday or the Sunday?</b> 4           A. I don't know. 5           <b>Q. Were you involved in any</b> 6 <b>discussion, you or anyone else from Cleary or</b> 7 <b>Barclays, involved in any discussions from the</b> 8 <b>Lehman folks or Weil Gotshal about the</b> 9 <b>inadvertent termination of the repo?</b> 10          A. It is my -- I don't think I 11 personally was, but here as a 12 30(b)(6) witness -- 13          <b>Q. You are Cleary Gottlieb, sir.</b> 14          A. -- internally. I was perfectly 15 happy not knowing in my life. 16               It is my understanding that 17 following up on the e-mail from Sullivan &amp; 18 Cromwell and the like, that the -- that there 19 may have been some discussions about, you 20 know, implementing this and getting it right 21 to -- to -- because it was, as I -- as I was 22 told at the time and we were told at the time, 23 and as I testified to, it was sent in error. 24 But I don't recall any other discussion. 25               I'm not aware of any other               TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2 discussion that Cleary Gottlieb was aware of 3 with the other side on, on this subject. 4           <b>Q. That's sort of where I'm leading.</b> 5 <b>Let me rephrase the question so you'll know</b> 6 <b>what it is I'm looking for here.</b> 7           <b>What knowledge does Cleary Gottlieb</b> 8 <b>have that Weil Gotshal or Lehman knew about</b> 9 <b>the termination of the repo, that it had been</b> 10 <b>terminated?</b> 11          A. I believe, as I testified a minute 12 ago, that there was an e-mail that Sullivan &amp; 13 Cromwell on behalf of Barclays sent to Weil 14 Gotshal. And I believe there were some 15 follow-up conversations referencing the fact 16 that there had been an inadvertent notice that 17 had been sent on this subject. Can I look at 18 the Clarification Letter? 19          <b>Q. Sure. Paragraph 13 is probably</b> 20 <b>where you want to go.</b> 21          A. Fine. 22          <b>Q. The language in Paragraph 13 was</b> 23 <b>supplied by Sullivan &amp; Cromwell, correct?</b> 24          A. I would have to look at this and 25 compare it to the words in the e-mail. I               TSG Reporting - Worldwide   877-702-9580</p>
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<p>1                   <b>-Lewkow-</b> 2 don't know the answer to that. 3           <b>Q. There is a reference in Paragraph</b> 4 <b>13 to the Notice of Termination, do you see</b> 5 <b>that?</b> 6          A. Yes. 7           <b>Q. Is the notice of termination that</b> 8 <b>is referred to in Paragraph 13 of the</b> 9 <b>Clarification Letter, the notice that we've</b> 10 <b>marked as Exhibit 27?</b> 11          A. Well, it says it is a notice of 12 termination in Paragraph 13 dated 13 September 19. Exhibit 27 that you've shown 14 me, that as I testified I do not believe I've 15 ever seen, it is dated September 19th. It is 16 from Barclays, it is to Lehman, and it says it 17 is a notice of termination. So it appears to 18 be it is, but that's all I can tell you. 19          <b>Q. Was there any discussion between</b> 20 <b>the folks on the Barclays side of the table,</b> 21 <b>including Cleary, and the folks on the Lehman</b> 22 <b>side of the table including Weil Gotshal,</b> 23 <b>about whether there were implications under</b> 24 <b>the Bankruptcy Code to the fact that the repo</b> 25 <b>had been terminated?</b>               TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2          A. It is my understanding that to the 3 best of Cleary Gottlieb's knowledge, no. 4           <b>Q. Did Cleary Gottlieb have</b> 5 <b>communications with any other person or entity</b> 6 <b>outside of your client, outside of Barclays</b> 7 <b>and Cleary, about Section 559 of the</b> 8 <b>Bankruptcy Code in connection with the</b> 9 <b>termination of the repo?</b> 10          MR. HUME: Outside of any 11 privilege. 12          MR. GAFFEY: Outside of any 13 privilege, yes. 14          A. To the best of my knowledge, no, 15 subject to this caveat. You will be taking my 16 partner's Ed Rosen's deposition. He was 17 involved in the discussions with DTC and other 18 clearance -- clearing entities. And since he 19 was going to be the 30(b)(6) witness on those 20 discussions, I have not consulted him. So as 21 to whether or not there was anything on that 22 point, I do not know the answer on behalf of 23 Cleary Gottlieb. Subject to that, the answer 24 is no. 25          <b>Q. Were there discussions about 559</b>               TSG Reporting - Worldwide   877-702-9580</p>

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<p>1                   <b>-Lewkow-</b> 2   <b>with any other self-regulating organizations</b> 3   <b>or governmental agency concerning Section 559</b> 4   <b>of the Bankruptcy Code.</b> 5       A. Not to my knowledge. 6       <b>Q. Mr. Lewkow, I'm going to show</b> 7   <b>you --</b> 8       A. This is starting to look like my 9   desk at the office. 10      <b>Q. I'm trying to make you feel at</b> 11   <b>home. Let me add this to the pile there and</b> 12   <b>show you what previously was marked as Exhibit</b> 13   <b>579B, a Declaration of Alan Kaplan, deputy</b> 14   <b>general counsel of Barclays, that's been</b> 15   <b>submitted in Barclays's opposition papers on</b> 16   <b>Rule 60. Have you seen this before?</b> 17      A. I can't remember if someone showed 18   me this in the last few days or not. 19      <b>Q. Take a minute if you would --</b> 20      A. I wouldn't swear that I haven't. 21   But if so, I didn't read it very careful. 22      <b>Q. There's a statement that Mr. Kaplan</b> 23   <b>makes that I want to see if you had any</b> 24   <b>knowledge about. And it's in Paragraph 4 of</b> 25   <b>his declaration. He is referring to the</b>       TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2   <b>notice going out erroneously, I'm</b> 3   <b>paraphrasing. Then he says, "The parties</b> 4   <b>corrected that error in Paragraph 13 of the</b> 5   <b>Clarification Letter." Do you see that?</b> 6       A. Yes, let me read all of 7   Paragraph 4, if I may? 8       <b>Q. Sure.</b> 9       <b>(Witness reviewing document.)</b> 10      A. Remind me of the question? 11      <b>Q. I think the question was: Do you</b> 12   <b>see that? But --</b> 13      A. I do. 14      <b>Q. Okay. When Mr. Kaplan says "the</b> 15   <b>parties", plural, "The parties corrected the</b> 16   <b>problem with Paragraph 13", I show you that to</b> 17   <b>see if it refreshes your recollection in any</b> 18   <b>way whether there were any discussions between</b> 19   <b>the parties, that is between Barclays and its</b> 20   <b>representatives and Lehman and its</b> 21   <b>representative, about the problem created by</b> 22   <b>the termination of the repo?</b> 23       MR. MORAG: Objection to the form. 24       A. I don't know what you mean by the 25   "problem created." But I believe it was       TSG Reporting - Worldwide   877-702-9580</p>
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<p>1                   <b>-Lewkow-</b> 2   discussed between the fact that this change 3   needed to be made, that it was sent in error. 4   It was discussed at least briefly between the 5   Barclays side, including Cleary and Sullivan &amp; 6   Cromwell, and the Lehman side including Weil, 7   yes. 8       <b>Q. Again, does it refresh your</b> 9   <b>recollection, where you read Mr. Kaplan</b> 10   <b>talking about "correcting an error," does it</b> 11   <b>refresh your recollection about whether there</b> 12   <b>were any discussions between the Barclays side</b> 13   <b>of the table including Cleary, and the Lehman</b> 14   <b>side of the table including Weil, about</b> 15   <b>implications into the Bankruptcy Code from the</b> 16   <b>termination?</b> 17      A. I answered that question. To the 18   best of my knowledge, there were no such 19   discussions. 20      <b>Q. If I could ask you to restrict your</b> 21   <b>answer, sir, to yes or no to the question I'm</b> 22   <b>about to ask you.</b> 23       <b>Were there any discussions between</b> 24   <b>Barclays and Cleary concerning implications</b> 25   <b>under the Bankruptcy Code of the termination</b>       TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2   <b>of the repo? Yes or no?</b> 3       MR. HUME: Objection to the extent 4   it calls for privileged communications. 5       MR. GAFFEY: I'm not sure yes or no 6   does. And I think I'm entitled to that 7   information under local Rule 26. 8       MR. HUME: Well, what's your basis 9   for saying -- 10      MR. GAFFEY: Local Rule 26 provides 11   that if privilege is asserted at a 12   deposition, I'm entitled to the same 13   information that would be included on a 14   privilege log, which would be the 15   author, recipient, subject matter of 16   the communication, of the otherwise 17   privileged communication. 18      That's why I'm restricting it to a 19   yes or no. 20      MR. MORAG: The issue here though 21   is you did not just ask about the 22   subject matter of the termination 23   notice being the subject of the 24   conversation, you asked for yes or no 25   as to the specific advice, whether it       TSG Reporting - Worldwide   877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 was discussed.</p> <p>3 MR. GAFFEY: Actually, no. I --</p> <p>4 MR. MORAG: You asked for the</p> <p>5 specific advice.</p> <p>6 MR. GAFFEY: It is phrased quite</p> <p>7 carefully not to. That's the point.</p> <p>8 That's the topic that would be on the</p> <p>9 privilege log.</p> <p>10 MR. MORAG: No, I believe it would</p> <p>11 be the Notice of Termination.</p> <p>12 MR. GAFFEY: Let me get a yes or no</p> <p>13 to that. Because I want to see where</p> <p>14 the instruction not to answer is</p> <p>15 framed.</p> <p>16 BY MR. GAFFEY:</p> <p>17 <b>Q. Were there discussions between</b></p> <p>18 <b>Cleary and Barclays concerning the termination</b></p> <p>19 <b>of the repo? Yes or no.</b></p> <p>20 A. Yes.</p> <p>21 <b>Q. When did those discussions take</b></p> <p>22 <b>place?</b></p> <p>23 A. Some point over Saturday or Sunday.</p> <p>24 <b>Q. Were there discussions between</b></p> <p>25 <b>Barclays and Cleary Gottlieb about</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>implications under the Bankruptcy Code in</b></p> <p>3 <b>connection with the termination of the repo?</b></p> <p>4 <b>Again, yes or no, please.</b></p> <p>5 DI MR. HUME: Again, objection. I</p> <p>6 instruct the witness not to answer.</p> <p>7 I don't believe the privilege log</p> <p>8 subject matter would have to reveal the</p> <p>9 specific nature of the communication,</p> <p>10 request for advice under Section Y, Y,</p> <p>11 Z. I mean --</p> <p>12 MR. GAFFEY: I understand you are</p> <p>13 going to assert it. I don't want to</p> <p>14 take time with the colloquy.</p> <p>15 MR. MORAG: Hold on one second.</p> <p>16 THE WITNESS: Can we talk outside?</p> <p>17 Is that all right?</p> <p>18 (Whereupon, a recess was taken</p> <p>19 from 12:07 p.m. to 12:09 p.m.)</p> <p>20 MR. MORAG: Subject to your</p> <p>21 agreement that whatever Mr. Lewkow</p> <p>22 responds will not constitute any waiver</p> <p>23 of the attorney/client privilege, which</p> <p>24 you said it wouldn't, but if you</p> <p>25 confirm that, Mr. Lewkow is prepared to</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 answer the question.</p> <p>3 MR. GAFFEY: Okay.</p> <p>4 THE WITNESS: Can I hear the</p> <p>5 question?</p> <p>6 MR. MORAG: The one that you were</p> <p>7 prepared to answer.</p> <p>8 MR. GAFFEY: I rephrased it. But</p> <p>9 let's read it back.</p> <p>10 THE WITNESS: Let's hear the last</p> <p>11 question.</p> <p>12 (Record read as follows:</p> <p>13 "Question: Were there discussions</p> <p>14 between Barclays and Cleary Gottlieb</p> <p>15 about implications under the Bankruptcy</p> <p>16 Code in connection with the termination</p> <p>17 of the repo? Again, yes or no,</p> <p>18 please.")</p> <p>19 A. To the best of my knowledge, no.</p> <p>20 <b>Q. What needed to be corrected, then,</b></p> <p>21 <b>in connection with the termination of the</b></p> <p>22 <b>repo? Do you know?</b></p> <p>23 A. That it was in error. It wasn't</p> <p>24 supposed to be terminated. I think I was told</p> <p>25 that it would create a monstrous obligation to</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 give notices and so forth and so forth to</p> <p>3 everyone who was on -- to various party,</p> <p>4 etcetera. That's all I remember.</p> <p>5 <b>Q. Did you or anyone else at Cleary</b></p> <p>6 <b>Gottlieb have an understanding that upon</b></p> <p>7 <b>termination of the repo in financing haircut</b></p> <p>8 <b>over and above the amount advanced would need</b></p> <p>9 <b>to be repaid into the estate of LBI?</b></p> <p>10 MR. MORAG: Objection. I think you</p> <p>11 are asking for a legal opinion from</p> <p>12 this witness.</p> <p>13 MR. GAFFEY: You are right. Let me</p> <p>14 withdraw that.</p> <p>15 <b>Q. Was there any discussion with</b></p> <p>16 <b>anyone outside of the circle of Cleary and</b></p> <p>17 <b>Barclays to the effect that the Bankruptcy</b></p> <p>18 <b>Code would require the financing haircut in</b></p> <p>19 <b>the repo to be paid back into the estate over</b></p> <p>20 <b>and above the amount that Barclays had</b></p> <p>21 <b>advanced in the Repurchase Agreement?</b></p> <p>22 A. Not to my knowledge.</p> <p>23 MR. MORAG: Objection to</p> <p>24 characterization.</p> <p>25 <b>Q. Do you know if anyone at Cleary had</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1                   <b>-Lewkow-</b></p> <p>2   <b>communications with anyone outside of</b></p> <p>3   <b>privilege, that is anyone outside of</b></p> <p>4   <b>communications with your client concerning</b></p> <p>5   <b>whether anyone would seek to stay the</b></p> <p>6   <b>application of 559 of the Bankruptcy Code in</b></p> <p>7   <b>connection with the termination of the repo?</b></p> <p>8       A. Not to my knowledge.</p> <p>9       <b>Q. In your capacity as a 30(b)(6)</b></p> <p>10   <b>witness, have you inquired about that topic?</b></p> <p>11       A. Yes.</p> <p>12       <b>Q. Is there a reason, Mr. Lewkow, that</b></p> <p>13   <b>Sullivan &amp; Cromwell was given the</b></p> <p>14   <b>responsibility for drafting the language in</b></p> <p>15   <b>Paragraph 13 as opposed to Cleary?</b></p> <p>16       MR. MORAG: Objection.</p> <p>17       MR. HUME: Objection. Calls for</p> <p>18   privilege.</p> <p>19       MR. MORAG: Yes, I mean --</p> <p>20       THE WITNESS: I think I can give</p> <p>21   some factual information, if you want</p> <p>22   me to.</p> <p>23       MR. GAFFEY: I do.</p> <p>24       THE WITNESS: Let him ask the</p> <p>25   question.</p> <p>TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2       MR. MORAG: I would ask you to</p> <p>3   first pose the foundational question of</p> <p>4   whether he knows there is a reason.</p> <p>5       <b>Q. Do you know whether there's a</b></p> <p>6   <b>reason Sullivan &amp; Cromwell drafted the</b></p> <p>7   <b>language in Paragraph 13?</b></p> <p>8       MR. HUME: I instructed the witness</p> <p>9   not to answer that. To the extent it</p> <p>10   reveals privilege, I don't know how you</p> <p>11   can answer it otherwise.</p> <p>12       THE WITNESS: I actually think I</p> <p>13   can.</p> <p>14       MR. HUME: If you can, go ahead.</p> <p>15       A. We had, as I testified earlier,</p> <p>16   basically nothing to do with the creation, the</p> <p>17   documentation, the implementation of the repo.</p> <p>18   I don't know whether Sullivan &amp; Cromwell did</p> <p>19   or not, but we had not. And so I'm not</p> <p>20   surprised that we had nothing to do with</p> <p>21   follow-ups with regard to that.</p> <p>22       <b>Q. Let's clean up the pile again and</b></p> <p>23   <b>go back to the Lewkow declaration, which is</b></p> <p>24   <b>the first thing I showed you. I forget the</b></p> <p>25   <b>exhibit number.</b></p> <p>TSG Reporting - Worldwide   877-702-9580</p>
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<p>1                   <b>-Lewkow-</b></p> <p>2       <b>In Paragraph 4, again, Mr. Lewkow,</b></p> <p>3   <b>you say, this is the last sentence, "Further,</b></p> <p>4   <b>I do not recall anyone involved in the</b></p> <p>5   <b>transaction ever suggesting that the deal was</b></p> <p>6   <b>supposed to be a 'wash' with the value of</b></p> <p>7   <b>assets acquired equal to the value of</b></p> <p>8   <b>liabilities assumed."</b></p> <p>9       <b>Did you or anyone else from Cleary</b></p> <p>10   <b>Gottlieb ever have conversations with Bart</b></p> <p>11   <b>McDade about his understanding of the</b></p> <p>12   <b>transaction?</b></p> <p>13       A. Bart McDade was -- about his</p> <p>14   understanding of the transaction, he was in</p> <p>15   the room at the time the Asset Purchase</p> <p>16   Agreement -- at times when the Asset Purchase</p> <p>17   Agreement was being negotiated. So in that</p> <p>18   context, I had -- we sort of had conversations</p> <p>19   with him. I don't recall any other</p> <p>20   conversations with him.</p> <p>21       <b>Q. Were any of the conversations with</b></p> <p>22   <b>him addressed to the topic of whether or not</b></p> <p>23   <b>it was a transaction in which the assets and</b></p> <p>24   <b>liabilities were supposed to roughly match?</b></p> <p>25       MR. MORAG: Object to the form.</p> <p>TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2       A. I have included in my declaration</p> <p>3   that I do not recall anyone involved in a</p> <p>4   transaction ever suggesting that. And so that</p> <p>5   is my recollection. And Bart McDade comes</p> <p>6   within the term of "anyone."</p> <p>7       <b>Q. I'm asking for a slightly different</b></p> <p>8   <b>question.</b></p> <p>9       <b>Was the topic ever discussed with</b></p> <p>10   <b>Mr. McDade?</b></p> <p>11       A. Not to my knowledge.</p> <p>12       <b>Q. Was the topic ever discussed with</b></p> <p>13   <b>anyone --</b></p> <p>14       MR. HUME: Objection. Go ahead.</p> <p>15       A. I don't know what the topic is.</p> <p>16       <b>Q. -- whether --</b></p> <p>17       A. The deal was the deal, okay. The</p> <p>18   agreement is reflected in the Asset Purchase</p> <p>19   Agreement as originally entered into and then</p> <p>20   as supplemented, clarified and amended by the</p> <p>21   Clarification Letter.</p> <p>22       <b>Q. I'm assuming, sir -- and correct me</b></p> <p>23   <b>if I'm wrong -- that there must have been some</b></p> <p>24   <b>discussions between the parties beyond the</b></p> <p>25   <b>level of well, the deal is the deal and it is</b></p> <p>TSG Reporting - Worldwide   877-702-9580</p>

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<p>1                   <b>-Lewkow-</b> 2   <b>there in that piece of paper.</b> 3       <b>So in those discussions, were there</b> 4   <b>any discussions with Mr. McDade about whether</b> 5   <b>or not the deal was one where assets and</b> 6   <b>liabilities were supposed to roughly match?</b> 7       A. I do not recall any discussion of 8   that topic with Mr. McDade. 9       <b>Q. Were there any discussions with</b> 10   <b>anyone from Lehman as to whether or not the</b> 11   <b>deal was one where assets and liabilities were</b> 12   <b>supposed to roughly match?</b> 13       A. The reason I am struggling with 14   your question is every time you have a 15   discussion about what the deal is and someone 16   doesn't say it is or it isn't a "wash" 17   transaction, is it about whether it is a 18   "wash" transaction? And insofar as that is 19   your question, well, then every conversation 20   was about whether it was or wasn't because it 21   was a discussion of what it was. But there 22   was no discussion of "wash" sales. 23       <b>Q. It is a fair point. Let me just</b> 24   <b>clear the record up a little bit on it and</b> 25   <b>I'll move on to another topic.</b>  TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2       <b>So I take it from your answer that</b> 3   <b>there was no discussion about that topic as</b> 4   <b>opposed to discussions that didn't mention it</b> 5   <b>and therefore, excluded it?</b> 6       A. I do not -- 7       <b>Q. There were no discussions about</b> 8   <b>that topic?</b> 9       MR. MORAG: Let him finish the 10   question so the record is clear. 11       <b>Q. There were no discussions expressly</b> 12   <b>about that topic?</b> 13       A. To the best of my recollection, 14   there were none. 15       <b>Q. Now, in Paragraph 5 of your</b> 16   <b>Declaration, generally the top Paragraph 5 and</b> 17   <b>6, you talk about generally the topic of</b> 18   <b>employment offers made by Barclays to certain</b> 19   <b>Lehman executives, and I'd like to ask you</b> 20   <b>some questions about that.</b> 21       <b>Was Cleary Gottlieb involved in any</b> 22   <b>way in the negotiations between Barclays and</b> 23   <b>Lehman executives to whom job offers were</b> 24   <b>made?</b> 25       A. I cannot recall -- "involved" in TSG Reporting - Worldwide   877-702-9580</p>
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<p>1                   <b>-Lewkow-</b> 2   negotiations, if you mean had meetings with 3   any of those executives or their 4   representative, I do not -- I believe the 5   answer is no. 6       <b>Q. You seemed concern. We may have a</b> 7   <b>disconnect on the phrase "involved" here.</b> 8       <b>Was there any indirect role for</b> 9   <b>Cleary in connection with the offering of</b> 10   <b>employment to Lehman executives by Barclays?</b> 11       A. The only -- the reason I phrased it 12   the way I did is because what I do not recall 13   is whether anyone at Cleary Gottlieb drafted 14   or saw a form of -- form of potential 15   employment agreement at some point that may or 16   may not have ever been, you know, traded with 17   any of the potential senior people, the eight 18   senior officials that were originally covered 19   by the Asset Purchase Agreement. 20       <b>Q. Do you know if there were</b> 21   <b>employment negotiations between Barclays and</b> 22   <b>Lehman executives other than the eight to whom</b> 23   <b>you just referred?</b> 24       A. At what time period are we talking 25   about?  TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2       <b>Q. Prior to the closing of September</b> 3   <b>22nd.</b> 4       A. I don't know about negotiations. 5   As I said in my declaration, it was clear that 6   it was very important to Barclays, everyone, 7   it was discussed that -- when you buy -- many 8   people have bought investment banking firms or 9   the businesses from such firms and spent a lot 10   of money, and then spent a lot more money 11   trying to keep people and then had those deals 12   blow up in their faces. 13       So everyone was aware that Barclays 14   wanted to retain not just eight people but a 15   lot of other key people, and that was 16   well-known. I do not know -- we were not 17   involved in any specific conversations, but it 18   would not -- consistent with my declaration, 19   it wouldn't surprise me if some of those 20   people particularly said, "Gee, we really look 21   forward..." I just don't know. 22       <b>Q. Look for a minute at Paragraph 9 of</b> 23   <b>your Declaration where you referred, and I</b> 24   <b>asked you about this sentence a while ago.</b> 25   <b>You say, "While I was not present for the</b> TSG Reporting - Worldwide   877-702-9580</p>



**-Lewkow-**  
actual discussions between Barclays and Lehman traders..." are you with me?

A. That's correct.

**Q. Do you know if any of the Lehman traders described in Paragraph 9 were among the Lehman employees to whom Barclays offered employment prior to September 22nd?**

MR. MORAG: Object to the form.

A. I have no idea.

**Q. Were there any discussions between Cleary and Barclays on the one hand and Lehman and Weil on the other hand about the degree to which the extent and nature of employment should be disclosed?**

A. No.

**Q. Do you know --**

A. Not to the best of my recollection.

**Q. Do you know if the nature and extent of the negotiations was disclosed to the Lehman Board?**

A. I have no idea what was disclosed to the Lehman Board.

**Q. At any point in the negotiations of the transaction or the discussions between the**

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**-Lewkow-**  
parties prior to the closing on September 22nd, did Cleary ask to see the minutes of any Lehman Board meeting concerning the transaction?

A. No.

**Q. Is that something that as an M&A lawyer you normally would ask for in a deal where you have a little more time than you had here?**

MR. MORAG: Objection to form.

A. Probably not. In fact, I think it would be highly unusual.

**Q. Do you know if Barclays made an offer of employment to Mr. McDade prior to September 22, 2008?**

A. I have a very vague recollection, and I -- from the time. But I've heard it since, so I'm not 100 percent certain I heard it at the time.

But I believe I heard at the time, whether they had offered it or not, but it had been determined that he had made a determination early on that he would not -- would not go with the business. And the

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**-Lewkow-**  
assumption was that he would not be joining the business.

**Q. I want to make sure your record and my record are clear here.**

**Can you tell me if you learned that before or after September 22nd?**

A. What I just testified is, I'm not sure. I believe I had learned it before, but I'm not certain of that.

**Q. Mr. Lewkow, I'm putting before you what was previously marked as Exhibit 581B, minutes of the meeting of Barclays Board of September 16, 2008. Have you seen those minutes before?**

A. No.

**Q. On page 3 of that exhibit, sir, is Paragraph 5 entitled "Retention of Lehman Staff, which says, "An in principle agreement had been reached with Lehman's U.S. senior leadership team on the bonus arrangements subject to approval of the proposals by the Board HR and Remuneration Committee."**

**I know you haven't seen the document before. Did Cleary know one way or**

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**-Lewkow-**  
the other that there were in principle agreements between Barclays and Lehman's U.S. senior leadership team on or about September 16, 2008?

MR. HUME: Objection. Vague.

MR. MORAG: Objection to the form.

MR. GAFFEY: Let me make it clear.

You are right.

**Q. Did you know that on September 16th?**

MR. HUME: Same objection.

A. September 16th? I don't know what "U.S. senior leadership team" means. I'm not sure if they are talking about there is a provision in the Asset Purchase Agreement about certain bonuses. But other than that, I have no idea what this is talking about.

MR. GAFFEY: That just saved me a whole page of my notes.

**Q. Mr. Lewkow, I'm handing you a series of documents which previously had been marked Exhibit 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37. And you will see, sir, that they consist of various iterations of the**

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1 **-Lewkow-**  
2 **Clarification Letter. I want to go through**  
3 **some of them.**

4 **And you will need handy, from**  
5 **amidst the other documents, we will refer from**  
6 **time to time to Exhibit 25, the final.**

7 A. Oh, the final? The Asset Purchase  
8 Agreement, too.

9 **Q. We may get to that, too. But maybe**  
10 **not.**

11 A. As long as there is no quiz on it.  
12 I guess it is --

13 **Q. The quiz will come after I take the**  
14 **exhibits away from you. It is sort of an open**  
15 **book test.**

16 **You testified a little while ago or**  
17 **we talked a little while ago concerning a**  
18 **point at which the language of the first**  
19 **paragraph of the final Clarification Letter**  
20 **came to include the phrase "supplement" and**  
21 **the phrase "amend." I just pinpoint that**  
22 **generally for the topic. All right?**

23 A. I testified a little bit about the  
24 word "amends," yes.

25 **Q. Will you take a look in the stack I**  
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1 **-Lewkow-**  
2 **have in front of you at Exhibit 34.**

3 MR. GAFFEY: Let's go off the  
4 record for a minute.

5 (Witness reviewing document.)

6 A. I'm looking in Exhibit 34.

7 **Q. Within Exhibit 34, it is both a**  
8 **clean and a blacklined draft. The blackline**  
9 **begins on page 10279851 in the lower**  
10 **right-hand corner. If you could go there,**  
11 **that will be helpful.**

12 MR. MORAG: Is there a reason that  
13 all the pages are numbered 10279851?

14 MR. GAFFEY: Yes. It has to do  
15 with how they were numbered at the  
16 outset. They weren't Bates.

17 A. Okay. I'm looking.

18 **Q. Do you see there that in that**  
19 **blackline which is in a draft bearing a date**  
20 **of September 19th, "WGM comments,**  
21 **September 19th noon," the blackline indicates**  
22 **that the phrase "supplements in certain**  
23 **respects the agreements of the parties stated**  
24 **therein, and shall amend the Agreement to the**  
25 **extent necessary so as to be consistent with**

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1 **-Lewkow-**  
2 **this letter and" has been added in the**  
3 **blackline?**

4 A. I see that.

5 Can I just state, on the page you  
6 are pointing to, it does say, "September 19th  
7 at noon." But my recollection is consistent  
8 with, if you go to the first page of this  
9 exhibit, I never saw the version that's at the  
10 top that shows an e-mail from Andy Keller to  
11 Steve Berkenfeld, not surprisingly.

12 The next -- but that then forwards  
13 a prior e-mail from Robert Messineo of Weil to  
14 a number of people, including me.

15 **Q. Right.**

16 A. And you will see that is --

17 **Q. September 19th, nine minutes after**  
18 **noon, right?**

19 A. Well...

20 (Witness reviewing document.)

21 **Q. So does that cover e-mail indicate**  
22 **to you that you had at least transmitted to**  
23 **you this draft at or about the time it was**  
24 **prepared?**

25 A. Yeah, I don't remember when I saw

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1 **-Lewkow-**  
2 **it. Uh-huh.**

3 **Q. Okay.**

4 **I'm going to ask you two questions.**  
5 **I will tell you why I'm asking the first one.**  
6 **I'm going to ask you if it pinpoints your**  
7 **memory of when the decision to include the**  
8 **phrase "supplement and amends" was included**  
9 **and whether it refreshes your recollection as**  
10 **to whether there were any events as to why it**  
11 **was determined to include it at that point?**

12 MR. MORAG: Objection. Compound.

13 **Q. But you can answer.**

14 A. It clearly came first. This was  
15 presented to us by Weil Gotshal. They added  
16 those words. I do not recall whether there  
17 was any conversation before then as to the  
18 fact that they were going to add those words  
19 when they prepared this draft. And since I  
20 don't recall any discussion on the front, I  
21 can only speculate, which I will not do, as to  
22 why Weil added those words.

23 **Q. I most certainly don't want you to**  
24 **speculate. I just want to know -- I take it**  
25 **the answer is no -- whether this refreshes**

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<p>1 -Lewkow-</p> <p>2 <b>your recollection as to whether any</b></p> <p>3 <b>development or event in the negotiations gave</b></p> <p>4 <b>rise to a decision to add the words</b></p> <p>5 <b>"supplement and amend"?</b></p> <p>6 MR. MORAG: That was communicated</p> <p>7 to you.</p> <p>8 MR. GAFFEY: That Cleary knew</p> <p>9 about. This is a 30(b)(6) witness.</p> <p>10 A. I would need to -- let me just</p> <p>11 think for a minute.</p> <p>12 I don't recall.</p> <p>13 <b>Q. Okay. Within the pile that I gave</b></p> <p>14 <b>you a moment ago, will you turn to Exhibit 31,</b></p> <p>15 <b>that's a September 18th -- it is under an</b></p> <p>16 <b>e-mail.</b></p> <p>17 A. I'm sorry. Which document?</p> <p>18 <b>Q. 31. That's under an e-mail from</b></p> <p>19 <b>Dave Messineo to you dated September 18, 2008,</b></p> <p>20 <b>11:40 p.m. GMT. Do you see that?</b></p> <p>21 A. Thursday night, yes.</p> <p>22 MR. MORAG: Can I just make a</p> <p>23 statement for the record? And I'm not</p> <p>24 suggesting this is the case. But with</p> <p>25 respect to Exhibit 34, I just did</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 notice that as an e-mail emanating from</p> <p>3 Weil Gotshal, it does not indicate at</p> <p>4 the bottom that there, in fact, was an</p> <p>5 attachment. I've often meant to send</p> <p>6 attachments that I didn't actually</p> <p>7 attach. And I'm not saying we didn't</p> <p>8 get it. But Exhibit 31, which also</p> <p>9 emanates from Weil Gotshal, does</p> <p>10 indicate below the subject line an</p> <p>11 attachment.</p> <p>12 THE WITNESS: We did get this.</p> <p>13 MR. MORAG: Okay.</p> <p>14 THE WITNESS: We did get this.</p> <p>15 MR. GAFFEY: So we don't have to be</p> <p>16 troubled by that. I get the concern.</p> <p>17 Do you notice it says "attached</p> <p>18 Clarification Letter"?</p> <p>19 MR. MORAG: It says it on the</p> <p>20 forward.</p> <p>21 THE WITNESS: It doesn't say it on</p> <p>22 the lower one, but that may be a</p> <p>23 difference between the Simpson system</p> <p>24 and how we attached it and the like.</p> <p>25 We did receive it.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 MR. MORAG: There are a number of</p> <p>3 drafts in this case that weren't sent</p> <p>4 to us.</p> <p>5 THE WITNESS: But this one, we did</p> <p>6 receive this one.</p> <p>7 MR. GAFFEY: My questions have</p> <p>8 nothing to do with when you got it. If</p> <p>9 I'm going to get there, I'll try to be</p> <p>10 very clear about it. So if that's a</p> <p>11 concern, you raise it.</p> <p>12 BY MR. GAFFEY:</p> <p>13 <b>Q. My question, Mr. Lewkow, goes to</b></p> <p>14 <b>Paragraph 10 of the draft that is within this</b></p> <p>15 <b>document.</b></p> <p>16 A. Of 31? Of Exhibit 31?</p> <p>17 <b>Q. Of Exhibit 31, yes.</b></p> <p>18 A. Which was late --</p> <p>19 <b>Q. The draft is entitled "WGM</b></p> <p>20 <b>Comments, September 18, 7:30 p.m."</b></p> <p>21 A. Right. Although it was sent to us</p> <p>22 at 11:40 p.m. on Thursday, September 18th.</p> <p>23 <b>Q. GMT, which would put you at 7:40</b></p> <p>24 <b>p.m. We spent a lot of time on this</b></p> <p>25 <b>documents, sir.</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 A. Oh, you did? You're right, I</p> <p>3 guess.</p> <p>4 <b>Q. So if would you take a look at</b></p> <p>5 <b>Paragraph 10, which has no translation. It is</b></p> <p>6 <b>Paragraph 10.</b></p> <p>7 A. Yes.</p> <p>8 <b>Q. There is a reference to the</b></p> <p>9 <b>"9/16/08 balance sheet." Do you see that?</b></p> <p>10 A. Yes.</p> <p>11 <b>Q. Do you know if that balance sheet</b></p> <p>12 <b>that's referred to there is the one that was</b></p> <p>13 <b>marked as Exhibit 19 that I showed you before?</b></p> <p>14 A. Is and was at the time my</p> <p>15 understanding that what they were referring to</p> <p>16 here was either the exhibit you mentioned or,</p> <p>17 as I testified earlier, some variant of that.</p> <p>18 I do not know it was precisely the one, but</p> <p>19 something like that exhibit that you just</p> <p>20 mentioned.</p> <p>21 <b>Q. To push that point a bit further,</b></p> <p>22 <b>if you can take a look at Exhibit 19 and look</b></p> <p>23 <b>at the lower right-hand corner and see that</b></p> <p>24 <b>it's got a time stamp on it of 11:18 a.m.</b></p> <p>25 <b>(Witness reviewing document.)</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>

-Lewkow-

A. So it does.

**Q. And the reference to Paragraph 10 is to a balance sheet printed at 11:18 a.m. on 9/16/08?**

A. Yes, it is.

**Q. Does that refresh your recollection in any way?**

A. It seems to be.

**Q. Does any of this refresh your recollection as to whether there were discussions during the course of the week after the APA had been signed about that balance sheet marked as Exhibit 19?**

A. My recollection, and I don't recall whether we knew this was going to be in the draft or not, but my recollection is that this showed up and we didn't think it was appropriate to start dealing with that document, which we had not intended to and had not included as an exhibit to the Asset Purchase Agreement. And so this did not stay in the Clarification Letter.

**Q. Were there any discussions between Barclays and Cleary Gottlieb on the one hand**

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-Lewkow-

**and Lehman and Weil Gotshal on the other about whether or not to include that sheet as an exhibit to the Asset Purchase Agreement?**

A. I believe that during the -- at some point at the very end of the finalization of the Asset Purchase Agreement, and it may have been -- you know, it was a final meeting at which people tried to finalize the Asset Purchase Agreement, and that is the meeting at which a Simpson Thacher associate sat between me and John Findley of Simpson Thacher and tried to act as scribe as the combined group of people around a very large rectangular table, square table reached agreement on final changes. And then she entered in handwritten form, which we have looked at previously or I testified about earlier today.

I believe, I'm not sure, but I believe it was in that context that someone on the Lehman side would have raised the idea, would it make sense to attach this document, Exhibit 19, or some variant thereof to the Asset Purchase Agreement. And a decision was made collectively not to do so.

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-Lewkow-

**Q. What was the basis for the decision made collectively not to do so?**

A. The agreement --

**Q. I withdraw "basis."**

**What was the reason it was decided not to do that?**

A. My recollection is that the piece of paper had been prepared by Lehman and shown to us and the like, and that there was one reference to it that was going into the Asset Purchase Agreement, but that it did not -- the agreement in the deal was to be embodied in the Asset Purchase Agreement, and we had not spent any specific time looking at Exhibit 19 or any variant of it with a view towards having legal significance and what it might mean and how it might modify the Asset Purchase Agreement.

The Asset Purchase Agreement was intended to stand on its own two feet.

**Q. Let me ask you to put before you Exhibit 35. It is included in the packet of documents that I gave you.**

A. Sure. Yes.

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-Lewkow-

**Q. And Exhibit 35, the first page, has an e-mail from David Murgio at 9:15 p.m. GMT, September 19, 2008 to among others you. And it attaches this, another draft of the Clarification Letter?**

A. Correct.

**Q. If you would, again, sir, please turn within the document to the blackline section which begins at page 10279864.**

A. Yup.

**Q. And within the definition of "Purchased Assets," "Excluded Assets" on the first page of that blackline --**

A. On the first page? First what?

**Q. On the first page of the blackline. Okay? Paragraph 1 of the blackline.**

A. Okay. You referred -- I didn't realize 64 was on all the pages.

**Q. It is. It is the first page marked 64.**

A. Okay.

**Q. And it is Paragraph 1, "Purchased Assets."**

**The underscored language in that**

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<p>1                   <b>-Lewkow-</b></p> <p>2 <b>draft includes the following, "Plus with</b></p> <p>3 <b>respect to securities of LBI shall also</b></p> <p>4 <b>include municipal securities, residential</b></p> <p>5 <b>mortgage securities and other securities of</b></p> <p>6 <b>which a summary description by category is</b></p> <p>7 <b>reflected in Exhibit A hereto. It being</b></p> <p>8 <b>understood that the long positions referred to</b></p> <p>9 <b>in clause (d) of Purchased Assets do not have</b></p> <p>10 <b>a book value of approximately 70 million." We</b></p> <p>11 <b>will take the "million" as a typo. I don't</b></p> <p>12 <b>think anybody used that number anywhere in</b></p> <p>13 <b>this deal.</b></p> <p>14           <b>My question to you, sir, is: Do</b></p> <p>15 <b>you recall a point in the negotiations of the</b></p> <p>16 <b>terms of the Clarification Letter where</b></p> <p>17 <b>language like this was proposed for the</b></p> <p>18 <b>definition of "Purchased Assets"?</b></p> <p>19           A. Let me respond with a number of</p> <p>20 comments.</p> <p>21           One, when we look at the first</p> <p>22 page of this exhibit, this was sent at 9:15</p> <p>23 GMT, which you pointed out in the other one,</p> <p>24 which makes it 5:15 New York time. At 5:15</p> <p>25 New York time, I was sitting in Judge Peck's</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2 room and the like. So none of us in the</p> <p>3 courtroom -- if I snuck a look at my</p> <p>4 BlackBerry, I might have known that this</p> <p>5 document had arrived, but I certainly had not</p> <p>6 looked at it at that stage.</p> <p>7           By the time -- I believe some of my</p> <p>8 colleagues did look at it. By time the Court</p> <p>9 had approved the sale around midnight, I</p> <p>10 believe -- and I then went back to the office.</p> <p>11 I think either late that night, I think we</p> <p>12 were told by Weil basically that this draft</p> <p>13 did not reflect the discussions that had taken</p> <p>14 place in the hour or two or three before the</p> <p>15 Court hearing had begun, were written by</p> <p>16 lawyers who had not been involved in those</p> <p>17 discussions and that a new draft would be</p> <p>18 prepared and we really should not spend a lot</p> <p>19 of time worrying about this.</p> <p>20           And in fact, a new draft was</p> <p>21 furnished to us some time early afternoon, I</p> <p>22 believe, on Saturday.</p> <p>23           <b>Q. In what respect did Weil lawyers</b></p> <p>24 <b>tell you in that conversation the draft did</b></p> <p>25 <b>not reflect the discussions that had taken</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1                   <b>-Lewkow-</b></p> <p>2 <b>place in the hour or two or three before the</b></p> <p>3 <b>Court hearing?</b></p> <p>4           A. That it didn't.</p> <p>5           <b>Q. Other than the statement that it</b></p> <p>6 <b>did not, did they provide any more detail as</b></p> <p>7 <b>to the manner --</b></p> <p>8           A. The lawyers --</p> <p>9           <b>Q. -- in which it did not?</b></p> <p>10           A. I believe that the lawyers who said</p> <p>11 that were the ones who had not been in on the</p> <p>12 discussions and they knew the discussions had</p> <p>13 taken place that had not been -- they had not</p> <p>14 been aware of when they did this. And I</p> <p>15 believe that's all they've done, to the best</p> <p>16 of my knowledge.</p> <p>17           <b>Q. In your Declaration, you refer at</b></p> <p>18 <b>some point to the fact that a draft of the</b></p> <p>19 <b>Clarification Letter had been sent by</b></p> <p>20 <b>BlackBerry during the sale hearing. I have to</b></p> <p>21 <b>confess I'm panting a little bit because I</b></p> <p>22 <b>can't find exactly where you say that.</b></p> <p>23           A. It's not in my declaration?</p> <p>24           <b>Q. I don't think so.</b></p> <p>25           MR. MORAG: It's Paragraph 11.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2           THE WITNESS: Yes, it is.</p> <p>3           (Witness reviewing document.)</p> <p>4           <b>Q. Here we go. Second sentence of</b></p> <p>5 <b>Paragraph 11, "Weil had circulated a revised</b></p> <p>6 <b>draft of the Clarification Letter by e-mail</b></p> <p>7 <b>during the sale hearing". Do you recall that?</b></p> <p>8           A. Yes. That's the one that I</p> <p>9 mentioned. It's this draft that arrived while</p> <p>10 I was in court, correct.</p> <p>11           <b>Q. That's this draft marked as</b></p> <p>12 <b>Exhibit 35?</b></p> <p>13           A. Correct.</p> <p>14           <b>Q. Did anyone in the court have any</b></p> <p>15 <b>discussions about the draft that was</b></p> <p>16 <b>circulated by e-mail?</b></p> <p>17           A. No.</p> <p>18           <b>Q. So other than this statement in</b></p> <p>19 <b>your Declaration that was circulated by</b></p> <p>20 <b>e-mail, do you have anything you can add as to</b></p> <p>21 <b>what anybody did about that fact? Anybody</b></p> <p>22 <b>read it? Talk about it?</b></p> <p>23           A. No one -- no one had more than a</p> <p>24 BlackBerry, no copies were ever delivered, to</p> <p>25 my knowledge, certainly not to Cleary Gottlieb</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 or Barclays in the courtroom. Whether</p> <p>3 somebody from Weil had them handed a draft or</p> <p>4 not? I don't know. But certainly no one on</p> <p>5 our side saw them in the courtroom.</p> <p>6 <b>Q. Now, there's a reference in the</b></p> <p>7 <b>blacklined portion of Paragraph 1 of</b></p> <p>8 <b>Exhibit 35 to a Schedule A, in that sentence I</b></p> <p>9 <b>read you about the long position? Do you see</b></p> <p>10 <b>that?</b></p> <p>11 A. Yes.</p> <p>12 MR. HUME: "Exhibit A."</p> <p>13 MR. GAFFEY: No. Schedule A.</p> <p>14 THE WITNESS: No. It actually says</p> <p>15 "Exhibit A."</p> <p>16 <b>Q. You're actually right.</b></p> <p>17 A. I see that.</p> <p>18 <b>Q. Was there any discussion that the</b></p> <p>19 <b>"Exhibit A" referred to there was the sheet</b></p> <p>20 <b>marked as Exhibit 19?</b></p> <p>21 A. Well, there was no discussion of</p> <p>22 this letter that I was aware of. I believe if</p> <p>23 you look at subsequent drafts, the concept of</p> <p>24 Exhibit A that dealt with -- it did survive,</p> <p>25 but it was a very different -- it was not</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 anything approaching Exhibit 19.</p> <p>3 <b>Q. Now --</b></p> <p>4 A. But I don't know what -- I do not</p> <p>5 know what Weil Gotshal had in mind, whether</p> <p>6 they had in mind something like Exhibit 19,</p> <p>7 but it certainly didn't stay in the</p> <p>8 agreement -- in the draft of the Clarification</p> <p>9 Letter.</p> <p>10 <b>Q. Now, at this point in the</b></p> <p>11 <b>chronology, let me be clear about this point,</b></p> <p>12 <b>the hearing is over, you're back at your</b></p> <p>13 <b>office, you were told by these Weil lawyers,</b></p> <p>14 <b>look, this draft doesn't reflect what happened</b></p> <p>15 <b>in the two or three days before the hearing,</b></p> <p>16 <b>at that point in time --</b></p> <p>17 A. Can I interrupt you?</p> <p>18 <b>Q. Absolutely.</b></p> <p>19 A. I don't think you got my testimony</p> <p>20 correctly. But it may be that I didn't state</p> <p>21 it clearly.</p> <p>22 I'm not sure that when I got back I</p> <p>23 had a conversation with Weil. I believe I got</p> <p>24 back and I was told by one of my colleagues</p> <p>25 that they had been told that by Weil.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 <b>Q. Okay. You get back to your office,</b></p> <p>3 <b>you learned that Weil has said, this draft</b></p> <p>4 <b>won't work because it doesn't reflect the</b></p> <p>5 <b>changes made in the two or three hours?</b></p> <p>6 A. I might also have been told that, I</p> <p>7 don't recall, but Tom Roberts or others who</p> <p>8 were in the courtroom from Weil Gotshal, that</p> <p>9 they might have said, ignore the stuff that my</p> <p>10 colleague sent you. I just don't recall.</p> <p>11 <b>Q. Do you recall Ms. Fife saying to</b></p> <p>12 <b>the judge at the sale hearing, we are working</b></p> <p>13 <b>on a Clarification Letter and we hope to have</b></p> <p>14 <b>it down here?</b></p> <p>15 A. I believe she did say something</p> <p>16 along that line, yes.</p> <p>17 <b>Q. At that point, during the sale, by</b></p> <p>18 <b>the time you're certainly in the middle of the</b></p> <p>19 <b>sale hearing, before that, had there been any</b></p> <p>20 <b>discussions between Barclays and its</b></p> <p>21 <b>representatives on the one hand and Lehman and</b></p> <p>22 <b>its representatives on the other, about</b></p> <p>23 <b>whether the Clarification Letter would need to</b></p> <p>24 <b>be submitted to the Court for approval?</b></p> <p>25 MR. MORAG: Objection to the form.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 A. My recollection is that on</p> <p>3 Wednesday and Thursday the goal had been to</p> <p>4 have a Clarification Letter that we could</p> <p>5 submit to the Court. The process was taking a</p> <p>6 longer time than anyone would have hoped,</p> <p>7 through no one's fault since everybody</p> <p>8 operated in good faith to try to get it done.</p> <p>9 But then on -- so it was already</p> <p>10 moving slowly. And by Friday, it was my</p> <p>11 understanding that Lehman and Barclays</p> <p>12 officials both learned that there were</p> <p>13 substantial assets that Barclays -- that the</p> <p>14 agreement contemplated -- the Asset Purchase</p> <p>15 Agreement contemplated that Barclays was going</p> <p>16 to receive as part of its acquisition of</p> <p>17 basically -- issue with only specified</p> <p>18 exceptions, basically all of the assets of the</p> <p>19 business. And there were a lot less -- in</p> <p>20 terms of financial assets that it turned out</p> <p>21 there were going to be a lot fewer than that</p> <p>22 Lehman was going to be able to deliver.</p> <p>23 And that had led to discussions</p> <p>24 that took place during the day Friday -- I</p> <p>25 don't know exactly when they started and when</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 they ended. I don't know if they were in</p> <p>3 person or over the phone -- between not the</p> <p>4 lawyers, between representatives of Barclays</p> <p>5 and representatives of Lehman. And that was</p> <p>6 going on until very shortly before the Court</p> <p>7 hearing began.</p> <p>8 So while it had been contemplated</p> <p>9 the day before that we would try to have a</p> <p>10 proposed form of, or maybe an actual form, I</p> <p>11 don't recall which, of Clarification Letter to</p> <p>12 provide to the Court, that events made that</p> <p>13 impossible.</p> <p>14 <b>Q. Now, I take it that between the</b></p> <p>15 <b>time of this draft marked as Exhibit 35 and</b></p> <p>16 <b>the finalizing of the Clarification Letter on</b></p> <p>17 <b>Monday, the signing of the Clarification</b></p> <p>18 <b>Letter on Monday, other changes are made. We</b></p> <p>19 <b>will get to those, but I just want to</b></p> <p>20 <b>establish the fact that changes were made over</b></p> <p>21 <b>the weekend, correct?</b></p> <p>22 MR. HUME: Objection, vague.</p> <p>23 Changes to what?</p> <p>24 MR. GAFFEY: To the Clarification</p> <p>25 Letter.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 A. Changes to the draft Clarification</p> <p>3 Letter were made that are reflected in the</p> <p>4 final Clarification Letter that was signed,</p> <p>5 yes.</p> <p>6 <b>Q. And some of those changes were made</b></p> <p>7 <b>over the weekend, Saturday the 20th and Sunday</b></p> <p>8 <b>the 21st, correct?</b></p> <p>9 A. New drafts were being prepared and</p> <p>10 changes to the prior draft were therefore</p> <p>11 made, correct.</p> <p>12 <b>Q. Now, the discussions that you</b></p> <p>13 <b>learned had taken place on Friday morning</b></p> <p>14 <b>between non-lawyers for Lehman and Barclays</b></p> <p>15 <b>that you referred to a moment ago --</b></p> <p>16 A. Morning or early afternoon. I'm</p> <p>17 not sure which.</p> <p>18 <b>Q. Was it your understanding that</b></p> <p>19 <b>those discussions were to include assets in</b></p> <p>20 <b>the deal, to make up for assets that Lehman</b></p> <p>21 <b>had not been able to deliver?</b></p> <p>22 MR. MORAG: Objection to form.</p> <p>23 A. Let me -- I think, I was told --</p> <p>24 and now I want to carefully describe how I was</p> <p>25 told it. But I was told it twice about the</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 conversation. I'm doing this and I'm looking</p> <p>3 at my counsel and Barclays counsel, so they'll</p> <p>4 caution me, I think.</p> <p>5 But I was told substantially the</p> <p>6 same. And to the extent there's differences,</p> <p>7 I don't remember which is which and what was</p> <p>8 the difference. I was told twice about the</p> <p>9 results of the conversations that I just</p> <p>10 alluded to that took place between Barclays</p> <p>11 representatives and Lehman representatives</p> <p>12 during the day Friday before the Court</p> <p>13 hearing.</p> <p>14 I arrived at the courthouse shortly</p> <p>15 before the Court was supposed to convene for</p> <p>16 this case. And while I was still outside the</p> <p>17 courtroom, having arrived -- while I was still</p> <p>18 outside -- not outside the courtroom, outside</p> <p>19 the courthouse. While I was still outside the</p> <p>20 Customs House, another car arrived, or taxi</p> <p>21 and out came several Barclays representatives,</p> <p>22 including Michael Klein.</p> <p>23 Michael Klein, I may have said,</p> <p>24 what's going on or what happened or something</p> <p>25 like that --</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 MR. HUME: Why don't I interject.</p> <p>3 THE WITNESS: Okay. I don't have</p> <p>4 to stay with that.</p> <p>5 MR. HUME: To the extent --</p> <p>6 THE WITNESS: Let me jump ahead.</p> <p>7 Let me just jump ahead. Go ahead.</p> <p>8 MR. HUME: Just so the record is</p> <p>9 clear, to the extent Barclays</p> <p>10 representatives communicated to you in</p> <p>11 a privileged setting facts that they</p> <p>12 later communicated in a way that is not</p> <p>13 privileged, you should disclose --</p> <p>14 THE WITNESS: The latter.</p> <p>15 MR. HUME: Be careful, but disclose</p> <p>16 only what was not privileged.</p> <p>17 BY MR. GAFFEY:</p> <p>18 <b>Q. On that point, I want you to go</b></p> <p>19 <b>back to what was next in a minute. But Klein</b></p> <p>20 <b>is there. Who else was there? Anybody non</b></p> <p>21 <b>Barclays was there?</b></p> <p>22 A. Not downstairs, no.</p> <p>23 <b>Q. So it was Barclays people and you?</b></p> <p>24 A. I had a conversation, and he</p> <p>25 summarized the results of the conversation.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 We then all went to the courtroom,</p> <p>3 which was a zoo, if I can use that technical</p> <p>4 term. And I was near the front of the</p> <p>5 courtroom near the well.</p> <p>6 I was sitting on -- I managed to</p> <p>7 get a seat which not many of us did -- on the</p> <p>8 side. I can't remember if there was a jury</p> <p>9 box in that courtroom or not. If so, I was</p> <p>10 just in the chairs just inside what would have</p> <p>11 been a jury box and next to the table at which</p> <p>12 Weil Gotshal as debtor's counsel was sitting.</p> <p>13 And there was a conversation that</p> <p>14 took place that -- of, you know, somewhere</p> <p>15 between four and eight people, I can't -- I</p> <p>16 think it was at least five people, six people,</p> <p>17 including Michael Klein, myself, Lori Fife,</p> <p>18 and a few other people. And it may -- among</p> <p>19 those other people may have been -- I don't</p> <p>20 think Harvey Miller was one of them. I'm not</p> <p>21 100 percent certain. I believe that one of</p> <p>22 them may have included, one or more of them</p> <p>23 may have been Lehman Brothers business folks</p> <p>24 or representatives, or Lazard representatives.</p> <p>25 I'm not sure. I don't remember.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 The only three people I am sure of</p> <p>3 were present were Michael Klein, Lori Fife and</p> <p>4 me. There may have been somebody else from</p> <p>5 Barclays there as well, like Archie Cox. I</p> <p>6 just don't remember.</p> <p>7 And Michael repeated it enough --</p> <p>8 as I said in the beginning, I don't recall</p> <p>9 which conversation is which. And they were in</p> <p>10 all, to the extent I can recall, they covered</p> <p>11 the same topic and were consistent with each</p> <p>12 other and I'm sure he used different words and</p> <p>13 the like. But he repeated what he had told me</p> <p>14 outside 30 or 40 or 50 minutes earlier, or 15</p> <p>15 or 10 or whatever.</p> <p>16 <b>Q. What did he say?</b></p> <p>17 A. I thought you'd ask that.</p> <p>18 He reported -- and I had -- he</p> <p>19 reported that it turned out that Lehman and</p> <p>20 Barclays had both -- officials had both</p> <p>21 learned in the prior 24 hours that a number of</p> <p>22 categories of assets that Lehman had told</p> <p>23 Barclays and agreed before the Asset Purchase</p> <p>24 Agreement had been signed and were covered by</p> <p>25 the Asset Purchase Agreement, as to categories</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 -- specifically specified categories.</p> <p>3 And of course, as you know,</p> <p>4 Barclays was to get under the Asset Purchase</p> <p>5 Agreement, except for specified excluded</p> <p>6 assets, we were supposed to get all assets</p> <p>7 used in the business. But there were certain</p> <p>8 assets, including financial assets that were</p> <p>9 included within that universe but were also --</p> <p>10 and so that Barclays had been led to believe</p> <p>11 were going to be delivered. That would be</p> <p>12 true whether or not they were also articulated</p> <p>13 as within the including language that follows</p> <p>14 in the definition of "Purchased Assets."</p> <p>15 But -- so it's the same universe</p> <p>16 either way. But certain of those assets,</p> <p>17 which we have been told were among the assets</p> <p>18 that Barclays would be getting would not --</p> <p>19 were not available to be transferred to us.</p> <p>20 That they either did not own or they had</p> <p>21 double counted or they were subject to liens</p> <p>22 in favor of third parties and they could not</p> <p>23 be delivered. And so he reported that.</p> <p>24 And he said that this was -- and</p> <p>25 again, I believe there may have been a Lehman</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 person standing there, but I can't tell you</p> <p>3 who, or a Lazard person, and that he had</p> <p>4 created real issues as to whether the deal</p> <p>5 could be due -- doable.</p> <p>6 He went on to describe a number of</p> <p>7 things that had come out as further</p> <p>8 investigation as to facts as well as further</p> <p>9 discussions and negotiations as to what to do,</p> <p>10 as to whether this deal could be saved and</p> <p>11 whether there would be no deal and there would</p> <p>12 be no one to purchase the assets and to</p> <p>13 purchase the business and leave the creditors</p> <p>14 to a liquidation scenario.</p> <p>15 But he reported on a number of</p> <p>16 things. First of all, that two category of</p> <p>17 assets should have been identified that could</p> <p>18 have been included in assets that Lehman used</p> <p>19 in the business and, therefore, should be</p> <p>20 coming to Barclays pursuant to the Asset</p> <p>21 Purchase Agreement, which had not been</p> <p>22 specifically ever mentioned or focused on by</p> <p>23 Barclays. And that those helped to some</p> <p>24 extent mitigate the shortfall that I just</p> <p>25 described based on what we had known.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>



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<p>1 -Lewkow-</p> <p>2 So, we had learned things that</p> <p>3 reduced the pool of assets that were worth --</p> <p>4 substantially all the assets that we were</p> <p>5 getting. But that there were two categories</p> <p>6 of assets that were within what we were</p> <p>7 getting that we had not focused on and that</p> <p>8 Lehman had not told us about were within the</p> <p>9 pool of assets that Lehman had available for</p> <p>10 transfer, that they could transfer and would</p> <p>11 transfer pursuant to the deal.</p> <p>12 And those, those two categories</p> <p>13 were the 15c3-3 reserve account or something</p> <p>14 like that. I'm not sure "reserve" is the</p> <p>15 right account. And where I was told -- I</p> <p>16 remember often this one being told the precise</p> <p>17 number, but I don't remember what number it</p> <p>18 is. But it was slightly over a billion-seven</p> <p>19 in -- and I believe he said in security, but</p> <p>20 he may -- he may not have been that specific.</p> <p>21 And the second was assets in what I</p> <p>22 was told was something called the clearance</p> <p>23 box about -- again, I may have been given a</p> <p>24 more specific number but this one is less</p> <p>25 vivid in my mind, of approximately two billion</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 of assets, and that these assets were</p> <p>3 available and would be transferred by Lehman</p> <p>4 as part of the transfer of essentially all the</p> <p>5 assets that they were going to be giving us.</p> <p>6 I was also told of some discussions</p> <p>7 of changes that needed to be made to the deal</p> <p>8 because that didn't -- the identification of</p> <p>9 those assets, of additional -- those assets</p> <p>10 that would be transferred as part of the deal</p> <p>11 didn't solve by any means the entirety of the</p> <p>12 problem that had been learned by both sides as</p> <p>13 to other assets that could not be transferred.</p> <p>14 And that certain changes to the</p> <p>15 deal were going to be made.</p> <p>16 One was -- and that first, another</p> <p>17 negative change in the deal from Barclays's</p> <p>18 perspective in that there was a -- there was</p> <p>19 in the Asset Purchase Agreement a concept</p> <p>20 of -- I forget what the word was. "Retained</p> <p>21 cash." It was a very strangely drafted</p> <p>22 clause. Because retained cash was Lehman's</p> <p>23 cash that Barclays would get and in a sense it</p> <p>24 was retained because it would be retained for</p> <p>25 use in the business that we were effectively</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 purchasing all the assets of, and certain --</p> <p>3 and assuming certain specified liabilities.</p> <p>4 And so I was told that the fact</p> <p>5 that Lehman would receive the -- Lehman would</p> <p>6 transfer the so-called retained cash was</p> <p>7 dropping away and that Barclays would not get</p> <p>8 that cash. I believe -- I believe I was told</p> <p>9 that they just didn't have free cash sitting</p> <p>10 around, but I don't remember precisely what</p> <p>11 words were used. I don't remember precisely</p> <p>12 what the words were on any, any of these.</p> <p>13 This is my recollection and paraphrase of what</p> <p>14 he told the group in the well in the courtroom</p> <p>15 before the hearing started with a half a dozen</p> <p>16 or so people.</p> <p>17 He also talked about a favorite</p> <p>18 topic, the RESIs, and that it turned out --</p> <p>19 wait a second. Hold on a second. -- no. I</p> <p>20 don't think -- I withdraw that. I don't think</p> <p>21 there is anything about the RESIs.</p> <p>22 He reported that another change</p> <p>23 that needed to be made that the parties had</p> <p>24 agreed to orally was to eliminate the</p> <p>25 provision that I testified about earlier in</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 response to some -- some of your questions</p> <p>3 that provided that if Barclays sold certain of</p> <p>4 the financial positions within one year and</p> <p>5 made a profit, that certain amounts of</p> <p>6 additional consideration or compensation would</p> <p>7 be paid to -- to Lehman, that that provision</p> <p>8 had also -- would be deleted.</p> <p>9 That -- let me just think if there</p> <p>10 was anything else that I can recall. That's</p> <p>11 my recollection.</p> <p>12 MR. GAFFEY: Do you want to take a</p> <p>13 lunch break?</p> <p>14 MR. MORAG: Yes. I believe it's</p> <p>15 available.</p> <p>16</p> <p>17 (Luncheon recess taken at 1:10 p.m.)</p> <p>18</p> <p>19 - - -</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 AFTERNOON SESSION</p> <p>3 (Time noted: 1:53 p.m.)</p> <p>4 VICTOR I. LEWKOW, resumed as a</p> <p>5 witness and testified as follows:</p> <p>6 CONTINUED EXAMINATION BY</p> <p>7 MR. GAFFEY:</p> <p>8 <b>Q. Mr. Lewkow, before the break you</b></p> <p>9 <b>were telling us about a conversation between</b></p> <p>10 <b>Michael Klein, Lori Fife, yourself and some</b></p> <p>11 <b>others, about discussions that had taken place</b></p> <p>12 <b>in the morning before the sale hearing.</b></p> <p>13 <b>Was there any discussion between</b></p> <p>14 <b>Barclays and its representatives on the one</b></p> <p>15 <b>hand, and Lehman and its representatives on</b></p> <p>16 <b>the other about what, if anything, of those</b></p> <p>17 <b>facts should be told to the judge in the sale</b></p> <p>18 <b>hearing?</b></p> <p>19 A. First of all, when you say -- you</p> <p>20 said "morning," I was very careful. I believe</p> <p>21 it continued until shortly before the hearing</p> <p>22 started at one o'clock, so I was not limited</p> <p>23 to the morning. The answer to your question</p> <p>24 is, no.</p> <p>25 <b>Q. As you sat through the sale hearing</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>and heard the presentations to the Court from</b></p> <p>3 <b>the various lawyers who spoke to the judge,</b></p> <p>4 <b>was Cleary and Barclays's comfortable that the</b></p> <p>5 <b>aspect of the deal that had been discussed in</b></p> <p>6 <b>that session prior to the sale hearing were</b></p> <p>7 <b>accurately disclosed to the judge?</b></p> <p>8 MR. MORAG: Object to the form.</p> <p>9 Certainly you speak to Cleary. As to</p> <p>10 Barclays, I'm not sure if that calls</p> <p>11 for a privilege conversation.</p> <p>12 MR. GAFFEY: Let me just ask as to</p> <p>13 Cleary. That's a good point.</p> <p>14 A. As was my understanding was,</p> <p>15 typical the debtor's counsel on a sale would</p> <p>16 normally be the ones who take the -- make the</p> <p>17 presentation to the Court.</p> <p>18 THE REPORTER: Can I ask you to</p> <p>19 please speak up? Thank you.</p> <p>20 THE WITNESS: I'll try.</p> <p>21 A. As typical, Weil as counsel for the</p> <p>22 debtor was making the presentation. Maybe in</p> <p>23 other context people would have seen a draft</p> <p>24 of what Lori Fife was going to say or the</p> <p>25 like. But certainly, since it was such a</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 moving target we had, as I told you in your</p> <p>3 last question, really hadn't had any</p> <p>4 consultation as to what exactly she and</p> <p>5 Mr. Miller were going to tell the Court.</p> <p>6 That having been said, as I sat</p> <p>7 there, I am, as a member of the Bar, I am -- I</p> <p>8 do have obligations and certainly if I had</p> <p>9 thought that I heard something that was</p> <p>10 inconsistent with my understanding of the deal</p> <p>11 or omitted information that was obvious that</p> <p>12 should have been -- would make the description</p> <p>13 of what the judge heard -- and by "description</p> <p>14 of what the judge heard," I include everything</p> <p>15 that he heard Wednesday and everything that</p> <p>16 was in the Asset Purchase Agreement that he</p> <p>17 had heard before.</p> <p>18 If I thought he was being misled, I</p> <p>19 obviously would have, as was Mr. Granfield who</p> <p>20 was my partner who I was sitting next to, we</p> <p>21 would have either, you know, addressed the</p> <p>22 Court directly or would have talked to Weil</p> <p>23 Gotshal and asked them to make appropriate</p> <p>24 other statements to the Court.</p> <p>25 <b>Q. As I understand the events and</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>discussions that Mr. Klein described to you,</b></p> <p>3 <b>essentially because Lehman was unable to</b></p> <p>4 <b>deliver certain assets within the</b></p> <p>5 <b>contemplation of the Asset Purchase Agreement,</b></p> <p>6 <b>other assets were substituted for them?</b></p> <p>7 MR. MORAG: Objection to form.</p> <p>8 A. No. I totally -- that is not a</p> <p>9 correct characterization.</p> <p>10 <b>Q. What is the correct</b></p> <p>11 <b>characterization?</b></p> <p>12 A. What I testified.</p> <p>13 <b>Q. Is it your testimony that the two</b></p> <p>14 <b>categories of assets you discussed, 15c3 and</b></p> <p>15 <b>the contents of the box, were covered by the</b></p> <p>16 <b>original language of the Asset Purchase</b></p> <p>17 <b>Agreement?</b></p> <p>18 A. I don't want to give you legal</p> <p>19 advice. But I will point you to the words of</p> <p>20 the Asset Purchase Agreement that basically</p> <p>21 says all assets used in the business, other</p> <p>22 than Excluded Assets, which is a defined term.</p> <p>23 <b>Q. At the time that you had the</b></p> <p>24 <b>conversation with Mr. Klein and Ms. Fife, was</b></p> <p>25 <b>it at that point still within the</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1                   <b>-Lewkow-</b></p> <p>2   <b>contemplation of the parties that the</b></p> <p>3   <b>Clarification Letter would be submitted to the</b></p> <p>4   <b>Court?</b></p> <p>5       A. Well, we -- I don't -- the -- it</p> <p>6   had been the contemplation on Wednesday and</p> <p>7   Thursday, and the goal had been to, as I</p> <p>8   testified earlier, to give the Court, to</p> <p>9   give -- to have that ready to give the judge.</p> <p>10   It was also the intention at that stage to try</p> <p>11   to close Friday evening.</p> <p>12       And on that sort of scenario, if,</p> <p>13   in fact, you were there, it would have been</p> <p>14   probably possible, one would have hoped to</p> <p>15   have had a Clarification Letter that one could</p> <p>16   have given to the Court.</p> <p>17       It was clear to me, but I don't</p> <p>18   recall that given what had changed and given</p> <p>19   that there was a draft that had been served up</p> <p>20   while we were in court, that -- given that it</p> <p>21   showed up when it did, I was dubious even</p> <p>22   before I saw it and before I talked to my</p> <p>23   colleagues as to whether it did or didn't</p> <p>24   reflect those discussions given the timing of</p> <p>25   it.</p> <p>          TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2       So to me, it was, it would have</p> <p>3   been shocking if before the Court could have</p> <p>4   approved it, whether we would have had a final</p> <p>5   Clarification Letter that we could have</p> <p>6   provided the Court.</p> <p>7       <b>Q. By the end of the sale hearing, no</b></p> <p>8   <b>Clarification Letter had been finalized and</b></p> <p>9   <b>everybody let to continue their work over the</b></p> <p>10   <b>weekend. Was there a point during the weekend</b></p> <p>11   <b>when there were conversations between Barclays</b></p> <p>12   <b>on the one hand and Lehman on the other</b></p> <p>13   <b>including their representatives, about</b></p> <p>14   <b>bringing the Clarification Letter to the</b></p> <p>15   <b>judge?</b></p> <p>16       MR. MORAG: Objection to the form.</p> <p>17       You can answer.</p> <p>18       A. What I recall, and to me the</p> <p>19   Clarification Letter was -- it was getting</p> <p>20   close to being signed. I have a vague</p> <p>21   recollection, I do have a recollection of</p> <p>22   sitting in the room -- I did a lot of sitting</p> <p>23   in the rooms -- with a number of Weil Gotshal</p> <p>24   lawyers, including Harvey Miller, including</p> <p>25   one or more of his corporate colleagues in</p> <p>          TSG Reporting - Worldwide   877-702-9580</p>
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<p>1                   <b>-Lewkow-</b></p> <p>2   which -- and this would have been late Sunday</p> <p>3   night, early hours of Monday morning. I don't</p> <p>4   know. But it was very late, very late in the</p> <p>5   game. It might have even been Monday.</p> <p>6       In fact, it might have been Monday</p> <p>7   morning, you know, 5:00, 6:00, 7:00, just</p> <p>8   shortly before we closed as I think about it.</p> <p>9   I don't know when it was. But it was late.</p> <p>10   It wasn't Saturday. It wasn't Sunday morning.</p> <p>11   It wasn't even Sunday afternoon. And we were</p> <p>12   very close to, you know, finish. The big</p> <p>13   issues that people were dealing with were DTC</p> <p>14   and J.P. Morgan and those sorts of issues were</p> <p>15   really the big issues that people were facing.</p> <p>16       But very late in the process,</p> <p>17   Harvey Miller saying to a group of -- you</p> <p>18   know, again, I don't know how many other -- it</p> <p>19   was a very fluid group of people who would be</p> <p>20   sitting in what room at what time that</p> <p>21   weekend. But there were a number of other</p> <p>22   Weil people and Harvey Miller and me. I don't</p> <p>23   remember whether any of my colleagues were in</p> <p>24   the room with me.</p> <p>25       And Harvey looked at the assembled</p> <p>          TSG Reporting - Worldwide   877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2   group and said something like, Does anyone</p> <p>3   think that we have done anything inconsistent</p> <p>4   with what we've told the Court and have to</p> <p>5   bring this -- go back to court? Or something</p> <p>6   like that. I don't remember the words. I'm</p> <p>7   totally paraphrasing.</p> <p>8       My recollection is, I've read</p> <p>9   Mr. Miller's deposition transcript, and he</p> <p>10   does not mention who -- he mentions a</p> <p>11   conversation which is, I think, more or less</p> <p>12   consistent with my recollection, but he</p> <p>13   doesn't mention that anyone from Cleary</p> <p>14   Gottlieb, like me, was there.</p> <p>15       But -- and he may have had more</p> <p>16   than one, so I have no way of knowing if it's</p> <p>17   the same conversation.</p> <p>18       But I do recall that. And he</p> <p>19   looked around the room and nobody said</p> <p>20   anything. It was mostly people on his side.</p> <p>21   So that's the one that -- you know, in</p> <p>22   connection with the finalization of the</p> <p>23   Clarification Letter, that conversation took</p> <p>24   place.</p> <p>25       <b>Q. Were any of your bankruptcy</b></p> <p>          TSG Reporting - Worldwide   877-702-9580</p>

**-Lewkow-**  
**partners present during this conversation?**

A. I do not believe so.

**Q. Have you read any other depositions?**

A. Yes. I've read parts or all of Mr. Miller's deposition, Mr. Hughes deposition and Mr. Ridings' deposition. I believe that's all.

**Q. Did you read both days of Mr. Hughes deposition?**

A. Yes. Skimming, yes.

**Q. Did you review any briefs or pleadings to prepare for your deposition?**

A. No.

**Q. Have you read the Rule 60 filed by the debtor or the Trustee or the Creditors Committee?**

A. No.

**Q. Have you had them summarized for you?**

MR. HUME: Objection. I think that calls for privileged conversations.

DI MR. MORAG: Same objection. I instruct you not to answer.

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**-Lewkow-**

**Q. Was there a time, was there not, where it was contemplated that the Clarification Letter would be styled as an amendment to the APA, as a contractual amendment to the APA. Do you recall that?**

MR. MORAG: Objection to form.

A. Contemplated by whom?

MR. GAFFEY: Can I have this marked as 614A?

(Deposition Exhibit 614A, Letter from S&C, CGSH 00020701-20714, marked for identification, as of this date.)

**Q. You have before you, Mr. Lewkow, what we marked as Exhibit 614A, a document bearing Bates numbers CGSH 00020701 through 20714. Have you seen that document before?**

A. Yes.

**Q. I'm sorry. I didn't hear you.**

A. Yes.

**Q. Did you see it at or around the time that it's dated, September 19, 2009?**

A. I think that around that time, I either saw the cover letter, cover e-mail, or saw a cover e-mail from one of my colleagues

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**-Lewkow-**  
basically dismissing it.

**Q. Why was it dismissed?**

A. Because it was not consistent, best I can recall. This was sent by someone at Sullivan & Cromwell who had not been involved directly in any of the discussions with -- regarding the Clarification Letter. We didn't know where this had come from. Hold on a second. Wait a second.

(Witness reviewing document.)

A. I think. I think a couple of things. Shortly after this -- this came on, what date is this?

(Witness reviewing document.)

A. Friday? May I look at amendment No. 1?

**Q. Sure. Absolutely.**

A. That you had given me earlier.

**Q. That's Exhibit 27, right, for the record?**

A. 24.

**Q. I beg your pardon. 24. You're right.**

MR. HUME: Can I just interject?

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**-Lewkow-**

To the extent that the question that's pending, I think --

THE WITNESS: I'm not sure.

MR. HUME: -- is why was it dismissed, to the extent to answer that question requires you to divulge any privileged conversations within Cleary or Cleary and Barclays, I instruct you not to answer. Otherwise you can answer.

A. The answer is I'm not sure -- I've seen the e-mail from one of my colleagues, I think it was Dave Wyman. But it was also, and I don't know the precise timing. One of the elements that I see is, and maybe the key element, was this rider that Ms. Summers had sent with this e-mail to deal with what was called -- a new section called a holdback to deal with the DTC problem.

In fact, later that day, Sullivan & Cromwell did, in fact, prepare a First Amendment to the Asset Purchase Agreement to try to address based on what -- what people understood at the time were the -- were the

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-Lewkow-  
facts relating to the residential real estate mortgage securities which were later learned were not the facts.

And in fact, amendment No. 1 was signed.

**Q. The Asset Purchase Agreement --**

A. More accurately, first amendment was signed.

**Q. And the Asset Purchase Agreement and the first amendment of the Asset Purchase Agreement, both were submitted to Judge Peck at the sale hearing. Do you recall that?**

A. They were both described. I assume -- I know the Asset Purchase Agreement had been submitted in a technical sense, whether the first amendment was or not, I assume it was, but I don't know for a fact.

**Q. I'll go back to a question I asked you a few moments ago.**

**Given that the Clarification Letter recites that it amends the Asset Purchase Agreement, was one of the three verbs that we talked about, that it "amends" the Asset Purchase Agreement.**

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-Lewkow-

**When Mr. Miller asked whoever was assembled in that room as to whether anyone thought it was different than what had been described to the Court, was there any part of that discussion that noted that this was an amendment to the agreement that had been submitted to the judge?**

MR. MORAG: Objection to the form and to the characterization of his testimony regarding Mr. Miller's statement.

A. I don't recall. I would note that Mr. Miller couldn't have been more clear on Friday to the Court that there were major changes in the deal. And so the fact that in part this was to some extent an amendment of certain aspects of the Asset Purchase Agreement, I think it was entirely consistent with what Weil Gotshal told the Court on Friday.

And the Court carefully considered as I recall the comments made by I think a few of the creditors and/or the Committee or somebody, I don't remember who, arguing that

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he should wait until he had the final document before he approved the sale. And he discussed that subject in his statements from the bench and concluded that he did not need to wait for a written document.

**Q. Was it Cleary's understanding coming out of the sale hearing that there were any limitations on what could be included in the clarification agreement and still be within the terms of the Sale Order?**

MR. MORAG: Objection. I think that's work product and privilege. Cleary's understanding? He can't answer it.

MR. GAFFEY: What's the privilege?

MR. MORAG: The mental impressions of a lawyer of what they couldn't --

MR. GAFFEY: I just want you to identify the privilege.

MR. MORAG: I said work product and attorney/client privilege.

MR. GAFFEY: Okay.

MR. MORAG: To the extent they were discussed with attorneys.

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-Lewkow-

**Q. Do you recall any colloquy with the Court that you witnessed on Friday concerning any limitations placed on the Clarification Letter?**

A. No. None other than what I testified to earlier.

**Q. Do you recall any restrictions in the Sale Order itself placing restrictions on the Clarification Letter?**

MR. HUME: Same objection, I believe.

MR. MORAG: I think --

MR. HUME: It calls for a legal interpretation of the Sale Order. That is a matter in the litigation and you're asking a lawyer how to interpret it for you. So I think it's asking for work product.

**Q. Were there any discussions between Barclays on the one hand including its representatives, and Lehman on the other including its representatives, as to whether there were any limitations in the sale order as to what could be included in the**

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<p>1                   <b>-Lewkow-</b> 2   <b>Clarification Letter?</b> 3       A. Yes. Two conversations. One I 4 testified to already, the late Sunday night or 5 late Monday morning conversation with 6 Mr. Miller. Earlier, I believe it was Sunday, 7 it was a crazy weekend, I believe it was 8 Sunday, there was a conversation in the 9 hallway where the subject of whether certain 10 circumstances, if we did certain things, would 11 lead to a change of -- that would require 12 going back to the Court. 13       <b>Q. Can you --</b> 14       A. I may have mischaracterized that. 15 Go ahead. Ask your next question. 16       <b>Q. Okay. My obvious question is: How</b> 17 <b>did you mischaracterize it?</b> 18       <b>But tell me what you remember about</b> 19 <b>that conversation. Who said what to who?</b> 20       A. So, as I testified earlier on 21 Friday, one of the things that Lehman Brothers 22 and Barclays had discovered that among the 23 Purchased Assets that Barclays was going to 24 receive in the -- pursuant to its purchase of 25 substantially all of the assets used in the TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2 business, other than Excluded Assets, that 3 although there had been very substantial 4 reductions in what Lehman could deliver, they 5 also had realized and ascertained that there 6 were assets that were part of their assets 7 used in the business that had not previously 8 been sort of focused on specifically by the 9 parties, although they were assets of Lehman 10 used in the business. 11       And I mentioned two -- two 12 categories of such assets. One was the 13 so-called 15c3-3 account. And I think I 14 testified -- I'm not sure, it's been a long 15 day so far. Maybe not. I may not have 16 mentioned this. But one of things that 17 Michael Klein had reported in describing that 18 was that he had been told by someone on behalf 19 of Lehman that there was some e-mail around in 20 which the -- pursuant to which referencing 21 that someone in the division of market 22 regulation at the SEC had confirmed that the 23 15c3-3, the assets in the 15c3-3 could, in 24 fact, be transferred by Lehman and at some 25 point, I believe Saturday morning or at some TSG Reporting - Worldwide 877-702-9580</p>
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<p>1                   <b>-Lewkow-</b> 2 point Saturday, we asked Weil to see that 3 agreement. 4       At some later point, I believe on 5 Sunday, but I couldn't swear to it at this 6 stage -- at some point, as I was walking in 7 the hallway of Weil Gotshal, we were in 8 meetings spread out over a large portion of 9 Weil Gotshal that was full of purely -- I 10 believe purely a conference space. There were 11 lots of meetings going on by different people. 12 There were people working on the Transition 13 Services Agreement, there were people dealing 14 with DTC, there were people just getting ready 15 to do a closing. Because all of the work had 16 to be done to be prepared to close, even while 17 other work was going on. Discussions with 18 JPMorgan Chase. 19       Anyway, we were with Weil Gotshal 20 on that floor. And as I was walking down the 21 floor, there were a number of the Weil 22 partners standing at this big desk which I 23 assume was the reception desk, although it 24 wasn't near the elevators where there was a 25 big reception desk. But I don't know. It TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b> 2 wasn't clear. Maybe it was for if you needed 3 secretaries during the conference room. I 4 don't remember what it was since I had never 5 been there during a working day, only on 6 weekend. 7       But standing around this desk were 8 a number of Weil lawyers. There may have well 9 been somebody from Lehman or Lazard there as 10 well, I don't recall. I believe Harvey Miller 11 was one of the people among the group that was 12 there for Weil, and they said we have -- you 13 asked for and we now have, it gave me the 14 impression they had just received it in the, 15 you know, minutes or the last hour or two, and 16 certainly not before then was the impression. 17 I'm not sure whether they said that or not. 18 That we now have the e-mail relating to the 19 15c3-3 account. And they showed it to me. 20 And I looked at it. 21       And they said that -- first 22 thing -- well, I noticed and commented on, I 23 believe I commented on, that it was not as I 24 had thought from the SEC but merely an 25 internal Lehman e-mail referencing a TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 conversation with the SEC, with someone on</p> <p>3 staff of the SEC.</p> <p>4 And somebody from Lehman, somebody,</p> <p>5 I'm sorry, from Weil said -- and it may have</p> <p>6 been Mr. Miller but I don't know. But</p> <p>7 somebody from Weil said something like, We</p> <p>8 didn't realize that some -- that the account</p> <p>9 was not entirely securities but included a</p> <p>10 bank account that -- with cash. It was a</p> <p>11 major bank. It was one of the things on that</p> <p>12 e-mail. So it was -- and as I recall, it was</p> <p>13 a million dollars in the bank account that</p> <p>14 Lehman maintained with a third party bank.</p> <p>15 And 700-plus, 760 odd million of securities</p> <p>16 were in that account.</p> <p>17 And in the course of that, one of</p> <p>18 the Lehman people, again, I believe it was</p> <p>19 Mr. Miller, but I'm not sure, said, the</p> <p>20 question is, does anyone remember exactly what</p> <p>21 Ms. Fife -- I don't think Ms. Fife was there</p> <p>22 at the time -- told the Court, when she was</p> <p>23 discussing the fact that you retain the cash</p> <p>24 provision in the Asset Purchase Agreement was</p> <p>25 being eliminated, did she say anything that</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 would be inconsistent with us transferring as</p> <p>3 part of all the assets of the business, the</p> <p>4 15c3-3 account which we now know includes a</p> <p>5 bank account.</p> <p>6 There then followed some further</p> <p>7 discussions on a number of -- let me just go</p> <p>8 through them.</p> <p>9 MR. MORAG: If you like.</p> <p>10 A. Go ahead, ask another question.</p> <p>11 <b>Q. Tell me about the further</b></p> <p>12 <b>discussions.</b></p> <p>13 A. So -- and I don't remember in</p> <p>14 quite -- again, this was a weekend that was</p> <p>15 very -- at the end of the week that had been a</p> <p>16 very complex and difficult and weak -- not</p> <p>17 just from the financial markets but from</p> <p>18 everyone on both sides of this deal who were</p> <p>19 trying to see if this deal could get done. So</p> <p>20 I don't remember how quickly it got done,</p> <p>21 whether it was dragged out over two hours or</p> <p>22 only over half an hour.</p> <p>23 But there were some follow-up</p> <p>24 conversations and one of the things -- it may</p> <p>25 have even dragged on longer than two hours.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 Because one of things we asked, or someone</p> <p>3 asked is -- I don't know who asked it. Is it</p> <p>4 possible, can we get a transcript, can we find</p> <p>5 out exactly what Ms. Fife said to the Court to</p> <p>6 see whether or not she said something that</p> <p>7 would be or might appear to be inconsistent</p> <p>8 now that we knew that the 15c3-3 account</p> <p>9 included a bank account.</p> <p>10 All of this is paraphrase. I do</p> <p>11 not remember precisely. All of my testimony</p> <p>12 where I say what people say is paraphrase. I</p> <p>13 don't recall specific words.</p> <p>14 So some time clearly passed while</p> <p>15 that -- but I don't remember how long, while</p> <p>16 people investigated that issue. And we were</p> <p>17 told at some point -- again, I don't know by</p> <p>18 whom -- that it would not be possible to get a</p> <p>19 transcript, that no transcript had been</p> <p>20 prepared, and that in effect the -- there had</p> <p>21 not been a court reporter, shockingly, but it</p> <p>22 had been -- there was a tape of the Court</p> <p>23 hearing, and that tape, we learned, was locked</p> <p>24 up in the courtroom. This was Sunday. I'm</p> <p>25 sure it was Sunday. That tape was locked up</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 in the courtroom, in the courthouse, there was</p> <p>3 no way to get access to it, and so there would</p> <p>4 be no way to obtain a transcript.</p> <p>5 There was some further discussion;</p> <p>6 at different points different people joined</p> <p>7 the discussion. Still in the hallway. All of</p> <p>8 this took place in the hallway. It may have</p> <p>9 been a return to the hallway, but it again</p> <p>10 happened in the hallway.</p> <p>11 And among those who joined the</p> <p>12 discussion, and there was more -- in fact, the</p> <p>13 original discussion there may have been four</p> <p>14 or five or six people, by then there were 10</p> <p>15 or 12 people. And included in the further</p> <p>16 discussions were from the Barclays side, both</p> <p>17 Michael Klein, I believe Archie Cox, I'm not</p> <p>18 hundred percent sure and my partner Ed Rosen.</p> <p>19 By then -- by some -- you know, was</p> <p>20 it a second conversation or a third</p> <p>21 conversation? I cannot recall. But at some</p> <p>22 point we had -- "we" being the Barclays side</p> <p>23 talked about --</p> <p>24 <b>Q. You shouldn't tell me about that</b></p> <p>25 <b>conversation.</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1                   <b>-Lewkow-</b></p> <p>2           A. I'm trying to figure out --</p> <p>3           MR. MORAG: There was a</p> <p>4           communication.</p> <p>5           A. There was a communication about</p> <p>6           what we had heard from Harvey Miller and/or</p> <p>7           others from Weil Gotshal that I described in</p> <p>8           my testimony, and that was discussed.</p> <p>9           And putting aside the conversation</p> <p>10          that I had with the Barclays representatives,</p> <p>11          when we got back and the discussion that I'm</p> <p>12          testifying to resumed with the other side, we</p> <p>13          said, look, if there's no transcript, nobody</p> <p>14          remembers precisely what he said.</p> <p>15          And so until we can get a</p> <p>16          transcript -- because she clearly had talked</p> <p>17          about cash and there was, you know -- the</p> <p>18          retained amount was not, was sort of cash that</p> <p>19          was free and available and not tied up in</p> <p>20          positions. It was just cash that we had been</p> <p>21          led to believe at the time of the Asset</p> <p>22          Purchase Agreement was totally free cash that</p> <p>23          they had somewhere, and that they were going</p> <p>24          to transfer as part of the Purchased Assets.</p> <p>25          And nobody knew precisely how</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2           Ms. Fife had, in describing the changes from</p> <p>3           the deal as reflected in the Asset Purchase</p> <p>4           Agreement, how precisely she had put it in</p> <p>5           describing those changes. And she had clearly</p> <p>6           indicated that that cash wasn't in -- wasn't</p> <p>7           going to be in the deal but again, nobody knew</p> <p>8           precisely what it was.</p> <p>9           And so the alternative, since</p> <p>10          nobody wanted to -- neither Weil Gotshal nor</p> <p>11          Lehman nor Barclays nor the lawyers wanted to</p> <p>12          do anything inconsistent with what the Court</p> <p>13          had been told, there were two choices</p> <p>14          available, which was to wait until Monday, get</p> <p>15          a transcript and see what, in fact, she had</p> <p>16          been told. And then, if necessary, go back to</p> <p>17          the Court.</p> <p>18          There were three choices. Just go</p> <p>19          back to the Court Monday morning or find</p> <p>20          another solution. And the other solution was</p> <p>21          the one that Barclays put on the table of</p> <p>22          saying, okay, we will take just the securities</p> <p>23          portion, 760-some-odd million in securities.</p> <p>24          And in the course of that discussion, Michael</p> <p>25          Klein said that if -- if for some reason you</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1                   <b>-Lewkow-</b></p> <p>2           can't --</p> <p>3           And there was some conversation by</p> <p>4           someone at Weil about do we -- do we need SEC</p> <p>5           approval. And Ed Rosen said no. And they</p> <p>6           said well -- they wanted to add language that</p> <p>7           we had no problem with, something saying</p> <p>8           "subject to applicable law," or something to</p> <p>9           that nature that ended up in the Clarification</p> <p>10          Letter.</p> <p>11          And then Klein said, Look, if we --</p> <p>12          you know, we're giving up this billion dollars</p> <p>13          that we thought we were getting as of Friday</p> <p>14          afternoon and we want to make sure we're</p> <p>15          getting this 769 million in securities, and so</p> <p>16          we want to add language that says -- again,</p> <p>17          I'm paraphrasing, that if we can't get that,</p> <p>18          you'll get us 769 million of securities of</p> <p>19          some other securities. That is my</p> <p>20          recollection.</p> <p>21          <b>Q. By the time of the conversation</b></p> <p>22          <b>with Mr. Miller on either Sunday night or</b></p> <p>23          <b>Monday morning concerning whether anyone</b></p> <p>24          <b>thought there were any aspects of the</b></p> <p>25          <b>Clarification Letter that required going back</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1                   <b>-Lewkow-</b></p> <p>2           <b>to the Court, had anybody seen a transcript by</b></p> <p>3           <b>then?</b></p> <p>4           A. No.</p> <p>5           <b>Q. Had anybody heard the tape by then?</b></p> <p>6           A. No.</p> <p>7           <b>Q. Was there any discussion on Monday</b></p> <p>8           <b>before the closing concluded of getting the</b></p> <p>9           <b>transcript or the tape to make sure the</b></p> <p>10          <b>Clarification Letter was consistent with the</b></p> <p>11          <b>Court's limitations or instructions?</b></p> <p>12          MR. MORAG: Object to the form.</p> <p>13          A. There was no -- to my recollection,</p> <p>14          there was no discussion of that. There was a</p> <p>15          belief by all of the people that's discussed</p> <p>16          that it was really important to get this deal</p> <p>17          closed and announced before the market opened</p> <p>18          Monday morning. There was -- the market --</p> <p>19          there had been press announcements that came</p> <p>20          out after midnight Friday night that had been,</p> <p>21          I believe, in the Saturday papers or Sunday</p> <p>22          papers or both, that the Court had approved</p> <p>23          the sale.</p> <p>24          And both Lehman and Barclays</p> <p>25          believed it was really important both from the</p> <p>TSG Reporting - Worldwide 877-702-9580</p>



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<p>1 -Lewkow-</p> <p>2 financial markets perspective and from the</p> <p>3 perspective of Barclays of keeping the Lehman</p> <p>4 employees -- and I want to come back to the</p> <p>5 Lehman employees in a second -- comfortable,</p> <p>6 that they should hang around and that there</p> <p>7 really was a deal. That there had been a real</p> <p>8 hope -- you know, there had been -- I think</p> <p>9 some of the press reports might have picked up</p> <p>10 the concept from this.</p> <p>11 I'm not sure of this, but I believe</p> <p>12 at least some of the press reports from people</p> <p>13 who had been in the courtroom had indicated</p> <p>14 that the deal might close over the weekend or</p> <p>15 would -- was expected to close over the</p> <p>16 weekend.</p> <p>17 And so there was great concern that</p> <p>18 if, in fact, the markets opened Monday morning</p> <p>19 and we had not announced a sale, that people</p> <p>20 would have thought the deal was falling apart</p> <p>21 or had fallen apart, was never going to</p> <p>22 happen, or what the heck is the problem out</p> <p>23 there. And in the markets that we lived in,</p> <p>24 this was in the course of the days when the</p> <p>25 papers were full of information talking about</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 whether Morgan Stanley will go under? Will</p> <p>3 Goldman Sachs go under? Will we be in a Great</p> <p>4 Depression? That was the context in which</p> <p>5 this conversation took place.</p> <p>6 And there was a belief, as I said,</p> <p>7 that the employees -- that this would be a</p> <p>8 major problem if we didn't announce the deal</p> <p>9 that we had closed by Monday morning before</p> <p>10 the market opened.</p> <p>11 I mentioned the employees. The</p> <p>12 employees were very important to this deal.</p> <p>13 Barclays was not -- you know, all of this</p> <p>14 discussion we've had and this testimony has</p> <p>15 been -- and I understand that, has been about</p> <p>16 the financial assets. Barclays was not doing</p> <p>17 this deal to buy a portfolio of financial</p> <p>18 assets. Barclays was doing this deal because</p> <p>19 it wanted to buy a broker-dealer investment</p> <p>20 banking business in the United States and was</p> <p>21 prepared to take very substantial risks in</p> <p>22 their view in doing that.</p> <p>23 And I say "very substantial risks"</p> <p>24 not focusing particularly on the financial</p> <p>25 assets but because of the fact that when</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 people have bought investment banking firms in</p> <p>3 the United States, they have often worked out</p> <p>4 very badly.</p> <p>5 Because it is not only what you pay</p> <p>6 day one but it's can you make it work? Can</p> <p>7 you get the employees to stay? Can you get</p> <p>8 them integrated? Can you keep them happy so</p> <p>9 as to create value for your shareholders? And</p> <p>10 that's true in the best of days.</p> <p>11 And I think of General Electric,</p> <p>12 pretty savvy acquirers as people would think.</p> <p>13 They had bought Kidder Peabody, spent a great</p> <p>14 deal of money and then spent a lot more money</p> <p>15 over the next X years trying to make it work</p> <p>16 and had lost a zillion bucks. A zillion is --</p> <p>17 I don't know. But they lost a lot of money.</p> <p>18 And not just the money they invested but the</p> <p>19 money they later put in to try to make it</p> <p>20 work.</p> <p>21 And that's what Barclays was</p> <p>22 committing itself to do. So the reaction of</p> <p>23 the employees and keeping the employees, in</p> <p>24 particular the key employees comfortable that</p> <p>25 they assumed -- and I think rightfully so, and</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 they may have known it as a fact, I don't</p> <p>3 know, but they assumed that really the</p> <p>4 Barclays -- the best Barclays [sic] people,</p> <p>5 the ones you most wanted to keep were getting</p> <p>6 other inquiries from competitors during the</p> <p>7 the days, during Monday, during the prior week</p> <p>8 over that weekend, etcetera, and it was</p> <p>9 important that we keep -- that Barclays be</p> <p>10 able to keep the people together.</p> <p>11 All of that went to the point that</p> <p>12 the parties believed, both parties, that it</p> <p>13 was really important to try to get this deal</p> <p>14 announced before the beginning of the market</p> <p>15 opening on Monday morning.</p> <p>16 <b>Q. Was the concern about announcing</b></p> <p>17 <b>the closing of the deal before the opening of</b></p> <p>18 <b>the market on Monday morning, a factor in the</b></p> <p>19 <b>decision of the group as to whether or not to</b></p> <p>20 <b>bring the Clarification Letter back to the</b></p> <p>21 <b>judge?</b></p> <p>22 A. No.</p> <p>23 MR. MORAG: Object to the form.</p> <p>24 A. The question was, the Court had</p> <p>25 approved the the Sale Order without the</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 Clarification Letter. He knew he didn't have</p> <p>3 the Clarification Letter.</p> <p>4 So the only question that I</p> <p>5 believed that Mr. -- the reason Mr. Miller</p> <p>6 asked the question, I believe as I described,</p> <p>7 was, Okay, what we're doing -- what we are</p> <p>8 doing here in the Clarification Letter, is</p> <p>9 it -- are we being consistent with what the</p> <p>10 Court had approved? Which turned on what the</p> <p>11 Court had heard, and heard again on Wednesday,</p> <p>12 on Friday in -- in the Asset Purchase</p> <p>13 Agreement and the other information that the</p> <p>14 Court had, and were we doing anything that was</p> <p>15 inconsistent with that.</p> <p>16 And this was why the question --</p> <p>17 so, the question was, the Court clearly knew</p> <p>18 that he didn't have to see the Clarification</p> <p>19 Letter. The question is had something</p> <p>20 happened that was inconsistent with what he</p> <p>21 had been told that would change that plan. He</p> <p>22 expected us to close over the weekend. That</p> <p>23 was what was talked about on Friday.</p> <p>24 So the only reason we would have to</p> <p>25 go back is if something had changed that made</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 it not be -- made a change that was</p> <p>3 inconsistent with what he had been told. It</p> <p>4 was for that reason in the prior conversation</p> <p>5 that there was uncertainty because we weren't</p> <p>6 sure what he had said about that to the extent</p> <p>7 it might or might not affect the ability to</p> <p>8 deliver the cash in that bank account that I</p> <p>9 mentioned that was part of the assets of the</p> <p>10 15c3-3 account, that since we weren't sure on</p> <p>11 that issue, that would have raised the problem</p> <p>12 that I testified about.</p> <p>13 But that was the only time that</p> <p>14 there was any discussion of going back. And</p> <p>15 even there, the concept was, how do we --</p> <p>16 Barclays gave up in its mind a billion dollars</p> <p>17 because it was important to get the deal</p> <p>18 closed on Monday morning.</p> <p>19 MR. GAFFEY: I don't have anything</p> <p>20 further.</p> <p>21 Thanks. Thanks for your time,</p> <p>22 Mr. Lewkow.</p> <p>23 THE WITNESS: Can we take a break?</p> <p>24 (Whereupon, a recess was taken</p> <p>25 from 2:41 p.m. to 2:52 p.m. )</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 EXAMINATION BY</p> <p>3 MR. MAGUIRE:</p> <p>4 <b>Q. Mr. Lewkow, as you know, my name is</b></p> <p>5 <b>Bill Maguire, I represent the SIPA Trustee.</b></p> <p>6 <b>Before we start with questions, your counsel</b></p> <p>7 <b>is going to put on the record the topics you</b></p> <p>8 <b>have been designated as representative today.</b></p> <p>9 MR. MORAG: As I think we confirmed</p> <p>10 to you separately, Mr. Lewkow and</p> <p>11 Mr. Rosen together are responding to</p> <p>12 the 30(b)(6) deposition notice served</p> <p>13 on Cleary Gottlieb and they have</p> <p>14 separately been subpoenaed for their</p> <p>15 own personal deposition, which you now</p> <p>16 have agreed to complete Mr. Lewkow's</p> <p>17 personal deposition along with his</p> <p>18 share of the 30(b)(6).</p> <p>19 With respect to 30(b)(6), the</p> <p>20 easiest way for me to explain it is</p> <p>21 that Mr. Rosen is addressing issues</p> <p>22 relating to the DTC, OCC, and the terms</p> <p>23 of the Clarification Letter relating to</p> <p>24 exchange-traded derivatives.</p> <p>25 To the extent there may be overlap</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 with respect to the 15c3-3 issue, then</p> <p>3 they're both designated.</p> <p>4 I think you know from the</p> <p>5 declaration, Mr. Rosen is a market</p> <p>6 regulation person and Vic is the</p> <p>7 mergers and acquisition.</p> <p>8 That may not be the precise answer,</p> <p>9 but if you have any question, you</p> <p>10 should certainly ask them of</p> <p>11 Mr. Lewkow. If it's Ed, he will tell</p> <p>12 you.</p> <p>13 MR. MAGUIRE: Thank you.</p> <p>14 BY MR. MAGUIRE:</p> <p>15 <b>Q. Sir, you have seen in the course of</b></p> <p>16 <b>today a number of drafts of the deal document,</b></p> <p>17 <b>many of them with the black lining or red</b></p> <p>18 <b>lining convention.</b></p> <p>19 <b>What was the practice in terms of</b></p> <p>20 <b>the Cleary team dealing with the Weil team and</b></p> <p>21 <b>the other parties in the course of negotiating</b></p> <p>22 <b>first the APA and then exchanging drafts in</b></p> <p>23 <b>connection with the Clarification Letter?</b></p> <p>24 MR. MORAG: Objection to form.</p> <p>25 Vague as to "practice".</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 A. This was in a very unusual deal</p> <p>3 because in the time period in which it was</p> <p>4 done, and I'm going to answer the question</p> <p>5 first with regard to the Asset Purchase</p> <p>6 Agreement and then with regard to the</p> <p>7 clarification.</p> <p>8 The Asset Purchase Agreement was --</p> <p>9 the first draft of the Asset Purchase</p> <p>10 Agreement was served up when everyone was</p> <p>11 involved. I mean, it doesn't mean there</p> <p>12 weren't phone calls back to clients and</p> <p>13 others. But all of the lawyers certainly and</p> <p>14 parts of the welded teams were sitting in one</p> <p>15 or the other of the conference rooms at Lehman</p> <p>16 Brothers and the first draft was served up by</p> <p>17 Lehman's counsel -- Weil and Simpson Thacher,</p> <p>18 I forget who -- that Monday night and it was</p> <p>19 signed about 25 hours later.</p> <p>20 Between the first draft on Monday</p> <p>21 night, and Tuesday night when it was signed,</p> <p>22 there were -- people were working in the same</p> <p>23 room on the document. It doesn't mean someone</p> <p>24 didn't take his or her laptop out of the room</p> <p>25 for a few minutes and worked on it, but</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 basically people were working on it together.</p> <p>3 And I am not sure that every interim draft was</p> <p>4 ever sent by e-mail from anyone to anyone else</p> <p>5 because people were together.</p> <p>6 There may have been copies -- this</p> <p>7 applies to the Clarification Letter as well --</p> <p>8 that were printed out and looked at by people</p> <p>9 onsite that were never sent outside of Lehman</p> <p>10 or Weil, depending on what we're talking about</p> <p>11 the Asset Purchase Agreement or the</p> <p>12 Clarification Letter. So it was all done very</p> <p>13 quickly. People were there together.</p> <p>14 As to the Clarification Letter, it</p> <p>15 was largely not negotiations. It was trying</p> <p>16 to -- and this is true to a large extent in</p> <p>17 the Asset Purchase Agreement as well. It was</p> <p>18 trying to, you know, get it right. People in</p> <p>19 good faith were trying to make sure they</p> <p>20 weren't -- given the incredible timeframe that</p> <p>21 was going on here, instead of weeks, it was</p> <p>22 being done within hours. People were</p> <p>23 trying -- on the Clarification Letter, I'm</p> <p>24 talking about Saturday and Sunday.</p> <p>25 There were drafts that were traded</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 back and forth electronically starting some</p> <p>3 point Wednesday through the Friday afternoon/</p> <p>4 evening one that I testified about earlier.</p> <p>5 But starting on Friday when we went to Weil</p> <p>6 Gotshal it was an effort to get the</p> <p>7 Clarification Letter finalized, consistent</p> <p>8 with the intent of the parties, consistent</p> <p>9 with, you know, the broad -- the Court's</p> <p>10 approval of the deal, including -- you know,</p> <p>11 knowing that there was going to be a</p> <p>12 Clarification Letter that would lay out the</p> <p>13 details, but certainly to avoid anything. To</p> <p>14 get it right and to make sure we had a deal</p> <p>15 that was -- that reflected the intent and</p> <p>16 didn't screw it up.</p> <p>17 So there were drafts. There may</p> <p>18 have been drafts on Saturday and Sunday at</p> <p>19 Weil that were not sent electronically. I</p> <p>20 have no way of knowing for sure.</p> <p>21 <b>Q. Specifically with respect to that</b></p> <p>22 <b>Saturday and Sunday, are you aware of any</b></p> <p>23 <b>instances where there wasn't an opportunity</b></p> <p>24 <b>for people to blackline changes for other</b></p> <p>25 <b>people to see?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 A. I don't -- I don't know. The</p> <p>3 work -- the other thing about it was that, you</p> <p>4 know, to some extent, particularly Sunday,</p> <p>5 people from various parties who were around</p> <p>6 were sitting in the same room working together</p> <p>7 on the documents. So it is -- it is certainly</p> <p>8 possible that there was one or more drafts</p> <p>9 that were not blacklined. I do not know.</p> <p>10 <b>Q. Did you have an expectation over</b></p> <p>11 <b>the weekend that if any of the folks changed a</b></p> <p>12 <b>term, that would either be discussed with the</b></p> <p>13 <b>other side or would be blacklined, there would</b></p> <p>14 <b>be something to point out that the change had</b></p> <p>15 <b>been made?</b></p> <p>16 A. Well, when you say "the other</p> <p>17 side," certainly Sunday, is my recollection,</p> <p>18 Weil Gotshal is certainly keeping the master.</p> <p>19 So we certainly didn't make any changes that</p> <p>20 weren't discussed because we didn't have the</p> <p>21 ability to do that.</p> <p>22 <b>Q. How did you make sure you were</b></p> <p>23 <b>aware of all the changes that, that somebody</b></p> <p>24 <b>was keeping up with all of them?</b></p> <p>25 A. As I said, there were, and it was</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

1 -Lewkow-  
2 mostly not me, but several of my partners were  
3 sitting in a room with Weil Gotshal lawyers  
4 and, you know, intermittently working on --  
5 along with everything else that was going on,  
6 intermittently working towards revising the  
7 document. And it doesn't necessarily mean  
8 that -- so, if something shows up, for  
9 example, in a draft at 8:00 p.m. and I have  
10 no recollection, I can go through it. We have  
11 documented evidence there were particular  
12 drafts that were sent by e-mail.

13 But at 8 p.m. it shows up in the  
14 draft, the prior draft at 2:00 p.m., it  
15 doesn't mean that the change was agreed to by  
16 the party at 8:00 p.m. It might have gone  
17 into somebody's computer at 3:15 p.m. but no  
18 one produced an interim draft.

19 **Q. How many Cleary professionals**  
20 **worked at Weil that weekend?**

21 A. You know, there were Cleary  
22 professionals, lawyers, dealing with a lot of  
23 different topics. We had a team working on  
24 the Transition Services Agreement, which was  
25 important to both Lehman, the estate as well

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1 -Lewkow-  
2 as to Barclays. We had people dealing with  
3 J.P. Morgan and DTC and OCC. We had people on  
4 some administrative stuff, but important  
5 administrative stuff talking -- dealing with  
6 the SEC staff.

7 So we had a lot of people. All  
8 told -- oh, and we had people working on the  
9 closing, trying to prepare for the closing --  
10 I don't know, somewhere between 10 and 15.

11 **Q. You mentioned that you became aware**  
12 **at some stage that DTC, of which I understand**  
13 **you to mean the Depository Trust Corporation,**  
14 **wanted to be protected. How did you become**  
15 **aware of that?**

16 A. My recollection is that at the  
17 Wednesday hearing on the the Sale Order, that  
18 somebody from Wachtell on behalf of DTCC had  
19 said some things that they had contacted our  
20 client and maybe us, and there started to be a  
21 whole issue of whether to use a phrase I had  
22 not heard before "the pipes would be open."

23 Whether or not -- if we closed  
24 Friday night or over the weekend, whether or  
25 not customers and others who were doing

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1 -Lewkow-  
2 business would be able to get access to their  
3 accounts. And DTC was an important part of  
4 that. And without that, the whole -- you  
5 know, there would have been an enormous mess  
6 on the hands of the financial system. I don't  
7 remember precisely when I was told precisely  
8 what.

9 **Q. Do you have your Declaration? I**  
10 **believe the copy was marked Exhibit 613A.**

11 A. Hold on. Let me find it.

12 (Witness reviewing documents.)

13 A. Yes. I have it.

14 **Q. In Paragraph 3 you describe the**  
15 **basis for your Declaration?**

16 A. Yes.

17 **Q. You mention your personal**  
18 **knowledge. You mention your review of**  
19 **transaction documents. Is that review the**  
20 **review that you did at the time or did you do**  
21 **a review of transaction documents for the**  
22 **purpose of preparing this declaration?**

23 (Witness reviewing document.)

24 A. Where are you looking at, counsel?

25 **Q. First line of Paragraph 3 of your**

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1 -Lewkow-  
2 **Declaration.**

3 A. Right.

4 **Q. "I base this declaration on my**  
5 **personal knowledge, review of transaction**  
6 **documents..."**

7 A. I did, in connection with the  
8 preparation of the declaration, review  
9 certain -- certain -- yeah, the purchase, the  
10 Asset Purchase Agreement and the  
11 clarification.

12 **Q. Anything else?**

13 A. I talked to some of my partners, as  
14 indicated.

15 **Q. Just talking about transaction --**

16 A. But you're talking about documents.  
17 I think to some extent I had looked at some of  
18 the drafts. I mean, I was doing this at the  
19 same time as I was starting to get ready for  
20 this day that I was so much looking forward to  
21 for the deposition.

22 So, you know, I had started looking  
23 at some materials and so -- so I had looked at  
24 some of the drafts, I think, before I signed  
25 the declaration.

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<p>1 -Lewkow-</p> <p>2 <b>Q. You mention here the recollection</b></p> <p>3 <b>of your partners. How did you go about</b></p> <p>4 <b>collecting the recollection of your partners?</b></p> <p>5 MR. MORAG: Object to the form.</p> <p>6 A. Can I answer that?</p> <p>7 MR. GAFFEY: Yes.</p> <p>8 A. Some of it was over the period of</p> <p>9 months, most of it was in the context of --</p> <p>10 you know, in the couple of weeks before I</p> <p>11 signed this. There were -- we had a few</p> <p>12 meetings. Some of it was, you know,</p> <p>13 one-on-one with me and a particular partner.</p> <p>14 Others were sitting in a room with several of</p> <p>15 my partners who had worked on the deal</p> <p>16 together with -- in some cases, Mr. Morag, I</p> <p>17 think once, I think by phone, at least once</p> <p>18 with Mr. Hume. So some -- but some of it was</p> <p>19 just in one-on-one conversations with some of</p> <p>20 my colleagues.</p> <p>21 <b>Q. Can you tell me who of your</b></p> <p>22 <b>partners you met with to discuss this</b></p> <p>23 <b>one-on-one?</b></p> <p>24 A. In what timeframe, sir?</p> <p>25 <b>Q. In the last few weeks. The period</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>you referred to in your last answer.</b></p> <p>3 A. In the last few weeks, putting</p> <p>4 aside Mr. Hume and Mr. Morag, had</p> <p>5 conversations with Duane McLaughlin, David</p> <p>6 Leinwand, Lindsee Granfield, to some extent Ed</p> <p>7 Rosen. I think that's it.</p> <p>8 <b>Q. And these are all --</b></p> <p>9 A. Oh, Bob Davis. Robert P. Davis.</p> <p>10 <b>Q. And these are all people you met</b></p> <p>11 <b>one-on-one?</b></p> <p>12 A. No. No. I'm not saying that at</p> <p>13 all. Some of those folks I only talked about</p> <p>14 this in larger groups. Some I had one-on-one,</p> <p>15 some I did maybe some of each.</p> <p>16 <b>Q. What about Mr. Rosen?</b></p> <p>17 A. Any conversation I had with him was</p> <p>18 in the context of there was some -- the</p> <p>19 context of us working together to prepare his</p> <p>20 declaration and my declaration. So I had no</p> <p>21 one-on-one conversations with Ed.</p> <p>22 <b>Q. Have you seen Mr. Rosen's</b></p> <p>23 <b>declaration?</b></p> <p>24 A. I did read it, yes.</p> <p>25 <b>Q. Did you see any drafts of his</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 <b>declaration?</b></p> <p>3 A. Yes.</p> <p>4 <b>Q. In any of the meetings that you</b></p> <p>5 <b>described with your partner, did Mr. Jonathan</b></p> <p>6 <b>Hughes participate?</b></p> <p>7 A. No, I don't believe he did.</p> <p>8 <b>Q. Did you have any meeting with</b></p> <p>9 <b>Mr. Hughes concerning any of the topics for</b></p> <p>10 <b>this deposition?</b></p> <p>11 A. In what timeframe?</p> <p>12 <b>Q. In the last few weeks.</b></p> <p>13 A. No. Last few weeks, I don't know</p> <p>14 how many weeks is "a few weeks."</p> <p>15 MR. MORAG: The question relates to</p> <p>16 the Deposition Notice to Cleary</p> <p>17 Gottlieb Steen &amp; Hamilton.</p> <p>18 A. No.</p> <p>19 <b>Q. Did you have any meetings with</b></p> <p>20 <b>Mr. Hughes?</b></p> <p>21 A. Oh, did anyone talk to Mr. Hughes?</p> <p>22 Is this addressed to me or --</p> <p>23 <b>Q. Yes, you.</b></p> <p>24 A. My personal, did I have any</p> <p>25 conversations in connection with the</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>declaration?</b></p> <p>3 <b>Q. In connection with any of the</b></p> <p>4 <b>topics that are in the Notice for this</b></p> <p>5 <b>deposition.</b></p> <p>6 A. Can I speak with counsel?</p> <p>7 <b>Q. Why don't we leave this for a</b></p> <p>8 <b>break?</b></p> <p>9 A. Sure.</p> <p>10 <b>Q. You can ask and then you can answer</b></p> <p>11 <b>after that.</b></p> <p>12 A. Sure.</p> <p>13 <b>Q. I gather from your earlier</b></p> <p>14 <b>testimony that you had almost a front row seat</b></p> <p>15 <b>at the sale hearing on the 19th of September?</b></p> <p>16 A. Yes.</p> <p>17 <b>Q. And you understood the purpose of</b></p> <p>18 <b>that hearing was for the Court to decide</b></p> <p>19 <b>whether to approve the sale of the business to</b></p> <p>20 <b>Barclays?</b></p> <p>21 A. Yes.</p> <p>22 <b>Q. Did you understand that the Court</b></p> <p>23 <b>needed to understand the economics of the</b></p> <p>24 <b>transaction in order to make that</b></p> <p>25 <b>determination?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1           <b>-Lewkow-</b> 2           MR. HUME: Objection. Vague. 3           Calls for speculation. 4           MR. MORAG: Objection to form. 5           A. I don't know what you mean by "the 6           economics." 7           <b>Q. Did you have an understanding that</b> 8           <b>the Court needed to know the overall values of</b> 9           <b>what were being provided to Barclays and what</b> 10           <b>Barclays -- the consideration that Barclays</b> 11           <b>was paying?</b> 12           A. It was my understanding that the 13           Court needed to know the terms of the deal. 14           The terms were, as set forth in the Asset 15           Purchase Agreement, and as -- with such 16           changes as were described to the Court. That 17           is what I believe was required and took place. 18           <b>Q. And you had no understanding beyond</b> 19           <b>that as to whether the Court needed to know</b> 20           <b>what the economic value of those terms were?</b> 21           A. You know, "economic value" is -- 22           there's all sorts of -- there are lots of 23           numbers around and the like. There was no -- 24           We were buying basically a 25           business. Obviously, everyone knew that             TSG Reporting - Worldwide   877-702-9580</p>	<p>1           <b>-Lewkow-</b> 2           Barclays thought that it was buying a business 3           because they thought in the long run they 4           would make money; that it would be a good 5           investment for them and a good acquisition -- 6           taking enormous risks in the course of doing 7           that. 8           So, you know, I don't know what -- 9           I don't know what you're getting at, 10           Counselor. But as I said, the Court needed to 11           know, and did know, the terms of the Asset 12           Purchase Agreement and they were told about 13           the material changes that, you know, were 14           going to be made to deal with -- as described 15           to the Court by Weil Gotshal. 16           <b>Q. Did you have any understanding as</b> 17           <b>to whether the Court, in making its</b> 18           <b>determination, needed to know what the value</b> 19           <b>was of the terms that you described?</b> 20           MR. MORAG: Mr. Lewkow -- 21           THE WITNESS: I think he's asking 22           for my legal -- 23           MR. MORAG: To the extent your 24           understanding is based on legal advice 25           that you developed yourself or someone             TSG Reporting - Worldwide   877-702-9580</p>
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<p>1           <b>-Lewkow-</b> 2           has provided to you within Cleary 3           Gottlieb, I instruct you not to answer. 4           A. I have no -- I'm not going to 5           respond. 6           <b>Q. Sir, on page 7, Paragraph 11 of</b> 7           <b>your Declaration, you refer to the Lehman</b> 8           <b>Trustees' representatives were present at</b> 9           <b>Weil. Did you meet with any of those</b> 10           <b>representatives?</b> 11           A. Not one-on-one. 12           <b>Q. Did you have any discussions with</b> 13           <b>them?</b> 14           A. They were in the room at various 15           times when discussions took place, and I 16           believe that they had other conversations with 17           the Debtors' representatives. 18           <b>Q. Do you recall any discussions you</b> 19           <b>had with any particular representative of the</b> 20           <b>Trustee?</b> 21           A. No. 22           <b>Q. Sir, if you turn to page 9 of your</b> 23           <b>Declaration. If you take a look at</b> 24           <b>Paragraph 17. If you read that first</b> 25           <b>sentence.</b>             TSG Reporting - Worldwide   877-702-9580</p>	<p>1           <b>-Lewkow-</b> 2           <b>(Witness reviewing document.)</b> 3           A. Read the first sentence? 4           <b>Q. Yes. The first sentence of</b> 5           <b>Paragraph 17.</b> 6           A. Uh-huh. Yes. 7           <b>Q. You refer there to your</b> 8           <b>conversations with your partners?</b> 9           A. Yes. 10           <b>Q. What are you referring to?</b> 11           A. Well, all I'm getting at is that I 12           was signing this declaration and it was my 13           knowledge. But in this sentence, it was 14           not -- as said in one of the introductory 15           paragraphs that you asked me about earlier, I 16           did consult with my -- some of my partners in 17           preparation -- in preparing this declaration. 18           And in particular, I bring attention to the 19           fact that this -- this does -- was not merely 20           in my presence, but I did confirm with my 21           partners that this was -- applied to them as 22           well. 23           <b>Q. And how did you do that?</b> 24           A. The conversations I've described to 25           you.             TSG Reporting - Worldwide   877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 <b>Q. With the partners you've named</b></p> <p>3 <b>earlier; is that correct?</b></p> <p>4 A. Yes. Yes.</p> <p>5 <b>Q. And what did you ask those</b></p> <p>6 <b>partners?</b></p> <p>7 MR. HUME: I'm going to object to</p> <p>8 that to the extent it calls for any</p> <p>9 question not necessary to confirm the</p> <p>10 facts set forth in the first sentence</p> <p>11 of Paragraph 17 which are facts</p> <p>12 relating to non-privileged</p> <p>13 communications and the like thereof</p> <p>14 between Cleary and Lehman's lawyers, or</p> <p>15 Lehman.</p> <p>16 A. All I --</p> <p>17 MR. HUME: You are not entitled to</p> <p>18 ask him every aspect of the</p> <p>19 conversations he had with his partners</p> <p>20 just because they confirmed facts.</p> <p>21 A. The answer is I asked --</p> <p>22 MR. MAGUIRE: Excuse me. Let me</p> <p>23 just make the record clear.</p> <p>24 <b>Q. I'm only asking you now about the</b></p> <p>25 <b>conversations you had with your partners for</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>the purpose of being prepared to prepare your</b></p> <p>3 <b>Declaration and for your testimony today.</b></p> <p>4 <b>And specifically what I'm asking</b></p> <p>5 <b>you is: How did you elicit from your partner</b></p> <p>6 <b>that no such suggestion had been made? The</b></p> <p>7 <b>suggestion being what you referred to in</b></p> <p>8 <b>Paragraph 17.</b></p> <p>9 A. I asked the more likely suspects.</p> <p>10 <b>Q. And what did you ask them?</b></p> <p>11 A. Whether or not they had ever heard</p> <p>12 of -- during those -- those day or two, a</p> <p>13 suggestion by the other side that the property</p> <p>14 that was securing the exchange- traded</p> <p>15 derivatives portion of the business that we</p> <p>16 were buying was not to be transferred as part</p> <p>17 of the Purchased Assets.</p> <p>18 <b>Q. Who was the person on the Cleary</b></p> <p>19 <b>team who had principal responsibility for that</b></p> <p>20 <b>part of the deal?</b></p> <p>21 A. Well, "that part of the deal"? So</p> <p>22 there were conversations including with the</p> <p>23 OCC that are referenced here, where -- but</p> <p>24 those weren't conversations with the other</p> <p>25 side. Those were conversations with the OCC.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 On that subject, I defer to Ed Rosen. He was</p> <p>3 certainly involved in the OCC conversations</p> <p>4 and there may have been others who were</p> <p>5 involved in those conversations. I was not</p> <p>6 involved in the OCC conversation.</p> <p>7 I was involved, as were the people</p> <p>8 I mentioned earlier, in the Clarification</p> <p>9 Letter. And those reflected conversations</p> <p>10 that took place in connection -- by those</p> <p>11 people who were present in connection at one</p> <p>12 point or another with the Clarification</p> <p>13 Letter. And they confirmed, as stated in my</p> <p>14 declaration, that to their knowledge, none of</p> <p>15 the -- none of those people, in conversations</p> <p>16 they were party to, had ever suggested what I</p> <p>17 say here, what I have in this Paragraph 17.</p> <p>18 <b>Q. Did anyone tell you about any</b></p> <p>19 <b>suggestion or any indication from anyone, that</b></p> <p>20 <b>any portion of the property held to secure</b></p> <p>21 <b>Lehman's exchange-traded derivatives was not</b></p> <p>22 <b>to be transferred to Barclays?</b></p> <p>23 A. No.</p> <p>24 <b>Q. Did anyone tell you that any</b></p> <p>25 <b>language --</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 MR. HUME: Excuse me.</p> <p>3 (Discussion off the record.)</p> <p>4 BY MR. MAGUIRE:</p> <p>5 <b>Q. Did anyone tell you that any</b></p> <p>6 <b>language concerning the transfer of margin to</b></p> <p>7 <b>Barclays had been deleted from a draft of the</b></p> <p>8 <b>Clarification Letter?</b></p> <p>9 MR. MORAG: Object to the form.</p> <p>10 A. I have trouble with the way you</p> <p>11 asked that question. There were a lot of</p> <p>12 changes that got changed over the weekend to</p> <p>13 the Clarification Letter to implement the</p> <p>14 transaction, to clarify the transaction,</p> <p>15 etcetera.</p> <p>16 So changes were made in the</p> <p>17 Clarification Letter, but they were</p> <p>18 consistent. Insofar as they relate to the</p> <p>19 margin on the exchange-traded derivatives, it</p> <p>20 was consistent with our understanding with</p> <p>21 what the Asset Purchase Agreement had always</p> <p>22 contemplated.</p> <p>23 And change X by itself might have</p> <p>24 one impact that you had to fix by, therefore,</p> <p>25 also changes -- making change Y, but the net</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

1 -Lewkow-  
2 result was to maintain exactly the same  
3 situation as it had always been, that the  
4 entire positions, including the margin  
5 associated with those positions was part of  
6 the deal.

7 **Q. I don't want to speak in**  
8 **generalities here. I want to ask you very**  
9 **specific questions. Were you personally made**  
10 **aware that language providing for margin,**  
11 **transfer of margin to Barclays, was deleted in**  
12 **a draft of the Clarification Letter?**

13 MR. MORAG: Objection.  
14 Mischaracterizes the evidence.

15 A. You're going to have to point me to  
16 something if you have something in mind. I  
17 can't -- I'm not sure I know what you're  
18 referring to, so I can't answer that question.

19 **Q. Do you have any recollection from**  
20 **the work that you did that any reference to**  
21 **"margin," to transferring margin to Barclays**  
22 **was deleted from a draft of the Clarification**  
23 **Letter?**

24 MR. MORAG: Object to the form.  
25 Mischaracterizes the evidence.  
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1 -Lewkow-  
2 A. I don't know what you're referring  
3 to, if anything.

4 **Q. Do you have any such recollection,**  
5 **sir?**

6 A. Deleting a reference to margin? As  
7 I said, there were changes that were made, and  
8 one change might have an unintended -- might  
9 either -- remember, these were drafts. They  
10 weren't signed except for the version that was  
11 signed.

12 There may have been changes where  
13 something got deleted and then the side effect  
14 of it was -- by somebody, rightly or wrongly,  
15 and then someone said, Wait a second, the  
16 effect of that is to have an impact that  
17 wasn't intended. So if that clause gets out,  
18 we have to add another clause somewhere else.

19 That happened in a few context in  
20 the Clarification Letter. I'm not sure if it  
21 happened here. And if so, it may have been  
22 fixed. But if so, it was to maintain the  
23 deal.

24 **Q. I'm not asking you now what might**  
25 **have happened. I'm asking you what you do**  
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1 -Lewkow-  
2 **remember; whether you have a recollection or**  
3 **whether you do not have a recollection.**

4 A. The reason -- look, the reason...

5 **Q. Why don't I rephrase the question**  
6 **and you can give me your best recollection?**

7 **Sir, do you have a recollection**  
8 **whether in a draft of the Clarification**  
9 **Letter, language concerning a proposed**  
10 **transfer of margin to Barclays was deleted?**

11 MR. HUME: I object to the  
12 question. To the extent you're asking  
13 about a specific provision that was  
14 changed, I think you need to show it to  
15 the witness in order for the record to  
16 be accurate. Otherwise, I think the  
17 record is inaccurate.

18 A. We went through a lot of drafts  
19 very quickly, and I'll be happy to go through  
20 them and answer your question.

21 **Q. Without going through the draft,**  
22 **sir, do you have an independent recollection?**

23 A. No.

24 **Q. Did any of the partners to whom you**  
25 **spoke, advise you that there had been language**

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1 -Lewkow-  
2 **transferring margin to Barclays that had been**  
3 **deleted from a draft of the Clarification**  
4 **Letter?**

5 **In any of the conversations that**  
6 **you testified that you had with your partners**  
7 **over the last few weeks?**

8 MR. MORAG: Objection. That calls  
9 for attorney/client communications and  
10 work product. You know that Mr. Rosen  
11 is responding to an assertion made in  
12 this case and they obviously -- he's  
13 already testified they discussed it.

14 MR. MAGUIRE: If you're directing  
15 the witness not to answer, that's one  
16 thing. Otherwise, I'll ask the witness  
17 to answer.

18 DI MR. MORAG: I'm directing him not  
19 to answer.

20 BY MR. MAGUIRE:

21 **Q. Sir, the next sentence of Paragraph**  
22 **17 starts, "to the contrary." Do you see**  
23 **that?**

24 A. Yes.

25 **Q. I'd like to ask you to focus on**

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<p>1           <b>-Lewkow-</b> 2   <b>your reference to the parties' communications.</b> 3   <b>Do you see that?</b> 4       <b>(Witness reviewing document.)</b> 5       <b>Q. Is there anything --</b> 6       A. Yes. 7       <b>Q. -- that you're referring to there</b> 8   <b>other than the e-mails to and from the OCC and</b> 9   <b>its counsel?</b> 10      A. I don't recall. Not to my personal 11   recollection. 12      <b>Q. You go on to mention the deal</b> 13   <b>documents?</b> 14      A. I do. 15      <b>Q. And you say that they "make clear,</b> 16   <b>do you see those words?</b> 17      A. Yes. 18      <b>Q. And you have a quote there, "Any</b> 19   <b>property that may be held to secure</b> 20   <b>obligations under such derivatives."</b> 21      A. Yes. 22      <b>Q. I take it that's a quote from the</b> 23   <b>deal documents?</b> 24      A. I believe so, unless we put in a 25   typo or something. But yes, that's my     TSG Reporting - Worldwide   877-702-9580</p>	<p>1           <b>-Lewkow-</b> 2   understanding. 3       <b>Q. In making this clear, is it your</b> 4   <b>understanding that those words are to be read</b> 5   <b>in their plain English meaning and not as any</b> 6   <b>term of art?</b> 7       MR. HUME: Objection. Vague. 8       MR. MORAG: Objection to form. 9       You're asking for a legal opinion. But 10      I think you can answer that question 11      without explaining why your answer is 12      what it is. 13      A. I don't understand the question. 14      <b>Q. When you say that this language</b> 15   <b>makes clear that Barclays was to receive, that</b> 16   <b>language, are you telling us it makes it clear</b> 17   <b>in its plain English sense? Or are you</b> 18   <b>suggesting there is some term of art here that</b> 19   <b>we should know about?</b> 20      MR. HUME: I object to the question 21      as it calls for a legal interpretation, 22      and I think the terms you are using are 23      vague. 24      A. I'm -- I find it vague. 25      <b>Q. If you're unable to answer the</b>     TSG Reporting - Worldwide   877-702-9580</p>
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<p>1           <b>-Lewkow-</b> 2   <b>question, sir, you can just say so.</b> 3      A. I think the deal documents made it 4   clear that they -- that we were to receive -- 5   that Barclays was to receive the exchange- 6   traded derivatives, including any property 7   that may be held to secure obligations under 8   such derivatives. 9      <b>Q. And those words are plain on their</b> 10   <b>face; is that your understanding?</b> 11      A. I don't think there's a trick in 12   those words. 13      <b>Q. Are you aware of any discussions</b> 14   <b>that anyone in the Barclays side had</b> 15   <b>concerning -- with anyone, from Lehman or the</b> 16   <b>Trustee or anyone else involved in the</b> 17   <b>transaction, concerning the subject of margin?</b> 18      A. Yes. 19      MR. MORAG: With regard to 20   exchange-traded derivatives or 21   otherwise? 22      MR. MAGUIRE: Yes. Any margin. 23      A. I believe that there was -- there 24   is a -- that there is a -- there was 25   discussion when language -- in the context of     TSG Reporting - Worldwide   877-702-9580</p>	<p>1           <b>-Lewkow-</b> 2   finalizing and prior to that the Clarification 3   Letter, that necessarily because some language 4   was added to eliminate any conceivable issue 5   and to reflect the original understanding in 6   the Asset Purchase Agreement, that on the 7   exchange-traded derivatives, that the margin 8   was part of the positions. So, yes. 9      <b>Q. Tell me what you know of those</b> 10   <b>discussions?</b> 11      A. Well, it would be helpful if I can 12   look at the Clarification Letter and the 13   various drafts. 14      <b>Q. We will certainly do that. But</b> 15   <b>first, I would like your independent</b> 16   <b>recollection of the discussions you recall</b> 17   <b>concerning the --</b> 18      A. My understanding -- and some of 19   this is personal recollection and some of it 20   is my capacity as a representative of the firm 21   under the 30(b)(6) -- that in the course of -- 22   a couple of things happened. One was the 23   discussions with the OCC that I was not 24   directly a party to it, that people had 25   focused on the margin, and that meanwhile     TSG Reporting - Worldwide   877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 people were playing with the -- people had</p> <p>3 made a variety of changes to do other things</p> <p>4 in the Clarification Letter.</p> <p>5 And at some point, language was</p> <p>6 added to confirm that it had -- and it was my</p> <p>7 understanding this was not at all</p> <p>8 controversial, to confirm the intention of the</p> <p>9 parties that in the Asset Purchase Agreement,</p> <p>10 signed in the Asset Purchase Agreement, that</p> <p>11 the intention was that the entire -- that the</p> <p>12 positions relating to exchange-traded</p> <p>13 derivatives that were being acquired by</p> <p>14 Barclays included the margin and in some words</p> <p>15 clarifying and making that specifically that</p> <p>16 those were within the all assets that were</p> <p>17 being purchased, other than Excluded Assets,</p> <p>18 that that was included.</p> <p>19 <b>Q. And who was involved in those</b></p> <p>20 <b>discussions that you just referred to?</b></p> <p>21 A. I believe one or more -- I may have</p> <p>22 been a participant to a very minor extent. I</p> <p>23 believe it was one or more of Duane</p> <p>24 McLaughlin, Bob Davis and Dave Leinwand and Ed</p> <p>25 Rosen. Ed Rosen I think may have been</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 involved as well.</p> <p>3 <b>Q. You said you were involved to a</b></p> <p>4 <b>very minor extent. Can you tell me what you</b></p> <p>5 <b>remember?</b></p> <p>6 A. What I told you. What I just</p> <p>7 testified to.</p> <p>8 <b>Q. With whom did you have discussions</b></p> <p>9 <b>about including margin, you personally? Not</b></p> <p>10 <b>in your representative capacity.</b></p> <p>11 A. To anyone other than my colleagues</p> <p>12 or my client?</p> <p>13 <b>Q. Yes.</b></p> <p>14 A. Not sure I did.</p> <p>15 <b>Q. Can you tell me, please, with whom</b></p> <p>16 <b>Duane McLaughlin had discussions about margin?</b></p> <p>17 MR. HUME: Excuse me. Is</p> <p>18 Mr. Lewkow designated as 30(b)(6) on</p> <p>19 this topic?</p> <p>20 MR. MORAG: No, he is not actually.</p> <p>21 A. Then you'll have to ask Mr. Rosen.</p> <p>22 <b>Q. The names you mentioned, Duane</b></p> <p>23 <b>McLaughlin, Bob Davis, Dave Weinman --</b></p> <p>24 A. It's David Leinwand,</p> <p>25 L-e-i-n-w-a-n-d.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 <b>Q. What is your basis for</b></p> <p>3 <b>understanding that they had discussions about</b></p> <p>4 <b>margin?</b></p> <p>5 A. Because they were involved in the</p> <p>6 clarification over that weekend. They were</p> <p>7 sitting with Weil Gotshal. Weil Gotshal was</p> <p>8 keeping, at least on Sunday, was running the</p> <p>9 documents and they were sitting there on and</p> <p>10 off talking to Weil Gotshal.</p> <p>11 And where everyone else was around</p> <p>12 in a room that was open to all the folks who</p> <p>13 were there that weekend and people came in and</p> <p>14 out. And that change was made. So that's my</p> <p>15 understanding they were involved.</p> <p>16 <b>Q. Did any of the gentlemen you</b></p> <p>17 <b>mentioned, the four people you mentioned, tell</b></p> <p>18 <b>you they had had discussions about margin?</b></p> <p>19 A. They told me that they were -- one</p> <p>20 or more of them, and I don't remember which</p> <p>21 ones. But I think a couple of them did</p> <p>22 indicate that they were -- that this provision</p> <p>23 which was added by Weil Gotshal in turning the</p> <p>24 documents, reflected conversation they had</p> <p>25 with Weil Gotshal.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>Q. Did they tell you anything more</b></p> <p>3 <b>about that?</b></p> <p>4 MR. HUME: This is all --</p> <p>5 THE WITNESS: This is all 30(b)(6).</p> <p>6 MR. HUME: It is either privileged</p> <p>7 or 30(b)(6), and you're not on the</p> <p>8 30(b)(6) topic. The only reason we're</p> <p>9 allowing it to go is based on your</p> <p>10 initial reference there to Paragraph 17</p> <p>11 of the declaration, which I assume is</p> <p>12 what you're asking.</p> <p>13 MR. MAGUIRE: Well, I would like to</p> <p>14 hear what the witness was told about</p> <p>15 the conversations with Weil.</p> <p>16 <b>Q. First of all, can you tell me who</b></p> <p>17 <b>of the four told you that they had a</b></p> <p>18 <b>conversation with Weil?</b></p> <p>19 MR. MORAG: Objection. Asked and</p> <p>20 answered. He just told you.</p> <p>21 A. I said, I don't recall.</p> <p>22 <b>Q. Can you tell me, what did they tell</b></p> <p>23 <b>you about the conversation other than they had</b></p> <p>24 <b>a conversation with Weil about margin?</b></p> <p>25 A. My recollection is that there --</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 their -- either as a result of other changes</p> <p>3 that had been made -- other things in the</p> <p>4 Clarification Letter or as a result of the OCC</p> <p>5 process, that somebody had raised the issue of</p> <p>6 whether it was still clear, as it had been in</p> <p>7 the Asset Purchase Agreement that there was</p> <p>8 any doubt on the subject and that Weil agreed</p> <p>9 that was the intention and they put it in.</p> <p>10 But I don't remember specifically. This was</p> <p>11 not negotiated is my understanding. It was</p> <p>12 agreed it went in because it was reflecting</p> <p>13 the transaction as it had always been --</p> <p>14 "always" meaning from the signing of the Asset</p> <p>15 Purchase Agreement onward, had always been</p> <p>16 understood.</p> <p>17 <b>Q. Do you know any of the details of</b></p> <p>18 <b>what the Cleary representatives told Weil in</b></p> <p>19 <b>this discussion --</b></p> <p>20 MR. MORAG: Objection. Asked and</p> <p>21 answered.</p> <p>22 <b>Q. -- about the margin?</b></p> <p>23 A. I told you everything I recollect,</p> <p>24 sir.</p> <p>25 <b>Q. You described earlier a hallway</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>conversation that you had which started with</b></p> <p>3 <b>your reviewing an internal Lehman e-mail. Do</b></p> <p>4 <b>you recall that testimony, sir?</b></p> <p>5 A. An internal Lehman Brothers'</p> <p>6 e-mail?</p> <p>7 <b>Q. Yes.</b></p> <p>8 A. Yes.</p> <p>9 MR. GAFFEY: I'll show you a</p> <p>10 document which we will mark as</p> <p>11 Exhibit 615A which is an e-mail from</p> <p>12 Joel Potenciano to a list of people, a</p> <p>13 long list of people, starting with</p> <p>14 Joseph Abate dated Thursday,</p> <p>15 September 18, 2008.</p> <p>16 (Deposition Exhibit, 615A, 2PP</p> <p>17 9/18/08 e-mail from J. Potenciano to</p> <p>18 distribution re: Preliminary 15c3-3</p> <p>19 reserve lock-up as of 9/17/08, marked</p> <p>20 for identification, as of this date.)</p> <p>21 <b>Q. If you can take whatever time you</b></p> <p>22 <b>need, sir, to examine that document and tell</b></p> <p>23 <b>me whether you've ever seen it before.</b></p> <p>24 (Witness reviewing document.)</p> <p>25 A. Well, it may be the printing. But</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 I recall seeing a document that -- that didn't</p> <p>3 have an attachment, the second page -- well,</p> <p>4 wait a second. I never saw this document.</p> <p>5 I've never seen this document. This is</p> <p>6 different than what I've seen.</p> <p>7 <b>Q. You described in some detail the</b></p> <p>8 <b>hallway conversation. Is there anything that</b></p> <p>9 <b>you recall of that conversation that you did</b></p> <p>10 <b>not describe in your prior testimony?</b></p> <p>11 A. Give me a minute, please.</p> <p>12 I gave a long answer. I don't</p> <p>13 remember precisely what I said. Nothing</p> <p>14 occurs to me at the moment that I did not</p> <p>15 include in that subject.</p> <p>16 <b>Q. Prior to that hallway conversation,</b></p> <p>17 <b>did you have an understanding of what a 15c3-3</b></p> <p>18 <b>account was?</b></p> <p>19 A. As I testified this morning, until</p> <p>20 that Friday afternoon -- this hallway</p> <p>21 conversation was on Sunday. Until Friday</p> <p>22 afternoon, I had -- I may have heard of it.</p> <p>23 But if so, it never registered in my</p> <p>24 consciousness. Prior to that, I really did</p> <p>25 not know anything about 15c3-3 accounts prior</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 to Friday.</p> <p>3 <b>Q. In the course of the hallway</b></p> <p>4 <b>conversation, did anyone describe what a 15c3</b></p> <p>5 <b>account was?</b></p> <p>6 A. At some point between Friday</p> <p>7 afternoon and Sunday, I heard a little bit --</p> <p>8 I don't remember from whom -- about 15c3-3</p> <p>9 accounts, and that it would -- that they were,</p> <p>10 you know, accounts maintained by a</p> <p>11 broker-dealer of their own assets, with their</p> <p>12 assets, but that for regulatory reasons were</p> <p>13 segregated in connection with the company's --</p> <p>14 the broker-dealers to protect the interest of</p> <p>15 clients of the broker-dealer.</p> <p>16 <b>Q. You understood that the assets were</b></p> <p>17 <b>restricted to ensure that customer property</b></p> <p>18 <b>could be returned to the customers?</b></p> <p>19 MR. MORAG: Object to the form.</p> <p>20 A. Yeah, I used the word "segregated."</p> <p>21 There were applicable -- I knew there were</p> <p>22 applicable SEC rules. Because if you could</p> <p>23 merely -- if tomorrow Goldman Sachs could take</p> <p>24 its 15c3-3 account and just spend it all on</p> <p>25 bonuses, if you will, that would eliminate the</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 protection that the rule is aimed at doing.</p> <p>3 I don't know if I would use the</p> <p>4 word you used, but I recognized that there</p> <p>5 were regulatory implications about the ability</p> <p>6 to take the money out that were tied to the</p> <p>7 accounts of the customers who were being</p> <p>8 directly or indirectly -- I'm not sure the</p> <p>9 details of how it works -- to provide some</p> <p>10 level of effort to the customers and clients.</p> <p>11 <b>Q. Was there a discussion of the</b></p> <p>12 <b>regulatory constraints on Lehman in releasing</b></p> <p>13 <b>funds from its c3 account?</b></p> <p>14 A. As I testified this morning, I</p> <p>15 believe that when the discussion took place,</p> <p>16 somebody from Weil -- none of the Weil people</p> <p>17 were experts at all on 15c3-3 accounts as they</p> <p>18 all said at the time. One of them made that</p> <p>19 point. And on our side, we did have someone</p> <p>20 who did have real expertise, Ed Rosen, who was</p> <p>21 participating at least by the latter stages in</p> <p>22 discussions. So somebody from Weil had raised</p> <p>23 the question of, "Gee, as far as we at Weil</p> <p>24 know, maybe we need approval from the SEC to</p> <p>25 do this. And Rosen said, "You don't need</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 approval to do it, there is no approval</p> <p>3 requirement."</p> <p>4 And they said, "Well, this is an</p> <p>5 account that we gather -- you know, we know is</p> <p>6 required as a regulatory matter. Let's at</p> <p>7 least say --" they may have proposed saying,</p> <p>8 you know, "subject to SEC approval," I don't</p> <p>9 remember if they used those words.</p> <p>10 And Ed said, "No, that's wrong</p> <p>11 because there is no need for SEC approval."</p> <p>12 And they said, "Can we say something like</p> <p>13 'subject to applicable law'?" Or something</p> <p>14 like that. And since we tried to comply with</p> <p>15 the SEC laws and rules, Ed did not object to</p> <p>16 that, and language to that effect went into</p> <p>17 the document.</p> <p>18 <b>Q. Did anyone explain that only an</b></p> <p>19 <b>amount in excess of a c3 calculation is</b></p> <p>20 <b>permitted to be removed from such a restricted</b></p> <p>21 <b>account?</b></p> <p>22 MR. MORAG: Objection to form.</p> <p>23 Answer with respect to anything you</p> <p>24 were told from the Lehman side.</p> <p>25 A. I believe that 15 -- as I</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 understood 15c3-3 with total non-expertise, it</p> <p>3 is a requirement that you maintain certain</p> <p>4 reserves in a segregated account to protect</p> <p>5 the interest of customers. And I don't</p> <p>6 recall -- I was aware certainly that basically</p> <p>7 Barclays was assuming the accounts. So I'm</p> <p>8 not sure whether there was a difference</p> <p>9 between an excess and a non-excess given that</p> <p>10 I don't think Lehman, as a broker-dealer, was</p> <p>11 going to continue to have customer accounts.</p> <p>12 But that's all I can say on that subject.</p> <p>13 <b>Q. In that hallway conversation,</b></p> <p>14 <b>Mr. Rosen did not say that only the excess</b></p> <p>15 <b>could be transferred?</b></p> <p>16 MR. MORAG: Is that a question?</p> <p>17 MR. MAGUIRE: Yes.</p> <p>18 A. I don't remember the word "excess."</p> <p>19 You'll have to ask Mr. Rosen.</p> <p>20 <b>Q. Did Mr. Rosen say anything about a</b></p> <p>21 <b>deficiency in the c3 account?</b></p> <p>22 A. There was no discussion of</p> <p>23 deficiency of the c3 account. Lehman Brothers</p> <p>24 on Friday -- I was told that Lehman Brothers</p> <p>25 on Friday had identified this account as</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 assets that consistent with the Asset Purchase</p> <p>3 Agreement that required the delivery of all</p> <p>4 assets used in the business other than</p> <p>5 specifically excluded assets. But they</p> <p>6 identified this account for the first time on</p> <p>7 Friday as assets that were Lehman, that Lehman</p> <p>8 could deliver to Barclays as the purchaser.</p> <p>9 And therefore, certainly no one had a</p> <p>10 discussion of the deficiency.</p> <p>11 <b>Q. Did anyone have any discussion</b></p> <p>12 <b>about a shortfall in customer property?</b></p> <p>13 A. I don't know what you mean by</p> <p>14 "shortfall" as opposed to "deficiency." To me</p> <p>15 it sounds the same. I don't -- no.</p> <p>16 <b>Q. Did anyone discuss where Lehman</b></p> <p>17 <b>would get the property to pay Barclays if it</b></p> <p>18 <b>was unable, could not get approval, to remove</b></p> <p>19 <b>the funds from the c3 account?</b></p> <p>20 A. I think --</p> <p>21 MR. MORAG: Object to the form of</p> <p>22 the question, to the word "funds." I</p> <p>23 think there has been testimony what was</p> <p>24 agreed to be transferred was</p> <p>25 securities.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 A. As I testified earlier, in the</p> <p>3 course of this discussion, Mr. Klein said in</p> <p>4 words or in substance that, okay, we will take</p> <p>5 the billion dollars that are sitting in a bank</p> <p>6 in cash, deposited with the bank but we want</p> <p>7 to get the 760-odd million. And if you can't</p> <p>8 get it there, we want to get it some other</p> <p>9 way. And that's my recollection of the</p> <p>10 discussion.</p> <p>11 <b>Q. In the middle of Paragraph 20 of</b></p> <p>12 <b>your Declaration, page 10, after you referred</b></p> <p>13 <b>to Mr. Klein, you say, "This was agreed to by</b></p> <p>14 <b>representatives of Lehman." Do you see that?</b></p> <p>15 A. Yes.</p> <p>16 <b>Q. What do you mean by "this"?</b></p> <p>17 A. That if the lead -- if there were</p> <p>18 legal constraints preventing transfer of the</p> <p>19 rule 15c3-3 account assets, Barclays would</p> <p>20 receive substitute assets.</p> <p>21 <b>Q. And who were the Lehman</b></p> <p>22 <b>representatives who agreed to that?</b></p> <p>23 A. At a minimum, it included the Weil</p> <p>24 group that was standing there. I don't know</p> <p>25 what authority they had. As I said, this took</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 place over a couple of conversations, I think.</p> <p>3 At a minimum, it included them.</p> <p>4 I actually believed that somebody</p> <p>5 from Lehman may have been with them during</p> <p>6 this discussion, but I don't have a distinct</p> <p>7 recollection of that. As I said, the group</p> <p>8 had gotten larger during the course of these</p> <p>9 two or three hallway conversations. But I --</p> <p>10 you know, certainly I leave it to Weil</p> <p>11 Gotshal.</p> <p>12 You know, I have enormous respect</p> <p>13 for Mr. Miller and Mr. Roberts and Ms. Fife</p> <p>14 and the other lawyers, and Mr. Masaneo, and</p> <p>15 the other lawyers who were there doing their</p> <p>16 best to represent their clients. They know</p> <p>17 what things they need to go back to and not go</p> <p>18 back to.</p> <p>19 So if there was no one from Lehman</p> <p>20 Brothers there -- I just don't recall if</p> <p>21 someone from Lehman was there at that moment</p> <p>22 or not. But Lehman -- Lehman's counsel -- and</p> <p>23 there may have been somebody from Simpson</p> <p>24 Thacher there as well. May well have been.</p> <p>25 Lehman's counsel agreed to it. And</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 then it went -- later in the day it got into a</p> <p>3 draft. So certainly -- I don't know what</p> <p>4 kind -- if Lehman people were not present at</p> <p>5 that moment, I assume Weil either had</p> <p>6 authority or obtained authority to include</p> <p>7 that in. But you'll have to ask them.</p> <p>8 <b>Q. How did Mr. Miller signify his</b></p> <p>9 <b>agreement to this?</b></p> <p>10 A. He said -- somebody from Weil said,</p> <p>11 okay, or yes, or that's not a problem. I</p> <p>12 don't know what words he used.</p> <p>13 <b>Q. Who was the person from Weil who</b></p> <p>14 <b>said one of those variety of comments?</b></p> <p>15 A. I don't -- I don't remember.</p> <p>16 <b>Q. And did you understand that person</b></p> <p>17 <b>from Weil to be agreeing that Barclays would</b></p> <p>18 <b>get \$769 million unconditionally as part of</b></p> <p>19 <b>the sale as opposed to simply agreeing to the</b></p> <p>20 <b>inclusion of the language proposed "to the</b></p> <p>21 <b>extent permitted by applicable law"?</b></p> <p>22 A. No, I think the phrase -- my</p> <p>23 understanding at the time and I think what we</p> <p>24 were all talking about was my understanding</p> <p>25 was the reason "to the extent permitted by</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 applicable law" or words of that nature were</p> <p>3 going to get added to the language was because</p> <p>4 of the technical rules governing 15c3-3 that</p> <p>5 the Weil lawyers had conceded they were not</p> <p>6 experts on.</p> <p>7 I had absolutely no expectation,</p> <p>8 and it was never suggested, to my</p> <p>9 recollection, that the limitation "to the</p> <p>10 extent permitted by applicable law" was a</p> <p>11 limitation on the broader statement: if we</p> <p>12 can't transfer that, we will transfer</p> <p>13 something else. That was not my</p> <p>14 understanding.</p> <p>15 <b>Q. Did you do anything to confirm your</b></p> <p>16 <b>understanding that when Weil, somebody at Weil</b></p> <p>17 <b>said "okay" or "yes", they were agreeing to</b></p> <p>18 <b>make this obligation unconditional as opposed</b></p> <p>19 <b>to simply agreeing to the inclusion of the</b></p> <p>20 <b>language proposed "to the extent permitted by</b></p> <p>21 <b>applicable law"?</b></p> <p>22 A. The language was drafted to reflect</p> <p>23 the conversation that took place in the</p> <p>24 hallway and was included in the Clarification</p> <p>25 Letter. I believe there is nothing else to</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 say. People agreed to a principle, it got</p> <p>3 reflected in the Clarification Letter.</p> <p>4 <b>Q. A couple of lines down in your</b></p> <p>5 <b>Declaration, you refer to some other language,</b></p> <p>6 <b>it's the phrase you referred to "are</b></p> <p>7 <b>securities of substantially the same nature</b></p> <p>8 <b>and value." Do you see that?</b></p> <p>9 A. Yes.</p> <p>10 <b>Q. Who proposed that language?</b></p> <p>11 A. I described the agreement, the oral</p> <p>12 agreement that was reached in the hallway. It</p> <p>13 was then left to the folks focusing on pushing</p> <p>14 the paper forward on the Clarification Letter,</p> <p>15 which included both Cleary folks and Weil</p> <p>16 folks and there were others involved, or at</p> <p>17 least in the room at some time during that</p> <p>18 conversation.</p> <p>19 And I believe that somebody did a</p> <p>20 first version of it that referred to -- of the</p> <p>21 same nature and didn't include "and value."</p> <p>22 And then someone on the Barclays' team said,</p> <p>23 "Well, that doesn't work because that</p> <p>24 wouldn't -- what does that mean?" So the</p> <p>25 words "and value" got put in.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>Q. Did anyone at Barclays go back and</b></p> <p>3 <b>ask anyone at Weil what that meant?</b></p> <p>4 A. What what meant, sorry?</p> <p>5 <b>Q. The words "are securities of</b></p> <p>6 <b>substantially the same nature"; what was meant</b></p> <p>7 <b>by that language?</b></p> <p>8 A. With all due respect, when people</p> <p>9 are trying to write a document and trying to</p> <p>10 get a deal done under incredibly difficult</p> <p>11 circumstances and somebody writes a language</p> <p>12 that on its face does not work to solve the</p> <p>13 problem that had been discussed and agreed to</p> <p>14 on all matters by people to solve a problem,</p> <p>15 and it was obvious that to say "the same</p> <p>16 nature" could mean one dollar worth of</p> <p>17 securities, that would have been an idiotic</p> <p>18 remark.</p> <p>19 We had no reason to believe that</p> <p>20 Weil was trying to sabotage the deal that</p> <p>21 their colleagues had agreed to. And so to my</p> <p>22 understanding, someone said, "You got to add</p> <p>23 the word 'and value'," and they said "Of</p> <p>24 course," and it happened.</p> <p>25 <b>Q. From whom did you get that</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 <b>understanding?</b></p> <p>3 A. From my colleagues, Mr. Davis,</p> <p>4 Mr. McLaughlin and Mr. Leinwand and one or</p> <p>5 more of that group.</p> <p>6 MR. HUME: Can we take a short</p> <p>7 break?</p> <p>8 THE WITNESS: Yes, I can use a</p> <p>9 bathroom break. Thank you.</p> <p>10 (Whereupon, a recess was taken</p> <p>11 from 3:58 p.m. to 4:24 p.m.)</p> <p>12 BY MR. MAGUIRE:</p> <p>13 <b>Q. Sir, over the course of the weekend</b></p> <p>14 <b>prior to closing, did you participate in any</b></p> <p>15 <b>meetings with the Creditors Committee?</b></p> <p>16 A. No. Let me add to that. That</p> <p>17 isn't to say that one or more members of the</p> <p>18 Creditors Committee may have been present when</p> <p>19 meetings took place. But I certainly did not</p> <p>20 have any -- to my knowledge, any particular</p> <p>21 meetings with the Creditors Committee.</p> <p>22 <b>Q. Let me show you a document that's</b></p> <p>23 <b>previously been marked as Exhibit 451.</b></p> <p>24 A. I got it.</p> <p>25 <b>Q. Do you recognize that document,</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>sir?</b></p> <p>3 A. Yes.</p> <p>4 <b>Q. What is it?</b></p> <p>5 A. This looks like, and this is the</p> <p>6 document, I'm quite sure, that I was shown and</p> <p>7 you asked me about before. This is the</p> <p>8 letter -- the internal Lehman Brothers' e-mail</p> <p>9 that I was shown that Sunday by Weil Gotshal</p> <p>10 with respect to the 15c3-3 reserve account.</p> <p>11 <b>Q. And you mentioned that a bank had a</b></p> <p>12 <b>billion dollars of cash. Are you referring to</b></p> <p>13 <b>the cash with Wells Fargo?</b></p> <p>14 A. Yes. On deposit with Wells Fargo.</p> <p>15 <b>Q. So you understand this was, taking</b></p> <p>16 <b>the billion dollars in cash out of the</b></p> <p>17 <b>transaction left \$769 million in qualified</b></p> <p>18 <b>securities?</b></p> <p>19 A. Yes.</p> <p>20 <b>Q. And that was in the subject of the</b></p> <p>21 <b>provision that was put in the Clarification</b></p> <p>22 <b>Letter?</b></p> <p>23 A. Yes.</p> <p>24 <b>Q. You'll see the reference here to</b></p> <p>25 <b>Mike Macchiaroli?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1           <b>-Lewkow-</b></p> <p>2           A. Yes.</p> <p>3           <b>Q. Did anyone from Barclays have any</b></p> <p>4 <b>discussions with Mr. Macchiaroli prior to the</b></p> <p>5 <b>closing concerning this issue?</b></p> <p>6           MR. MORAG: To your knowledge.</p> <p>7           A. Not to my knowledge.</p> <p>8           <b>Q. Did anyone from Barclays have any</b></p> <p>9 <b>discussion with anyone at the SEC concerning</b></p> <p>10 <b>the c3 account?</b></p> <p>11           A. Not to my knowledge.</p> <p>12           <b>Q. I'll show you a document we</b></p> <p>13 <b>previously marked as Exhibit 49.</b></p> <p>14           A. Yes.</p> <p>15           <b>Q. Do you know whether you've seen</b></p> <p>16 <b>this before?</b></p> <p>17           A. Yes, I have.</p> <p>18           <b>Q. When did you first see it?</b></p> <p>19           A. At or about the time it was sent.</p> <p>20           <b>Q. When did you last see it?</b></p> <p>21           A. I think in preparation for this</p> <p>22 deposition, it's -- I didn't study it closely.</p> <p>23 But I did quickly look at the various drafts</p> <p>24 that my counsel had provided me.</p> <p>25           <b>Q. And you understand this is a</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1           <b>-Lewkow-</b></p> <p>2 <b>revised Clarification Letter that Mr. Leinwand</b></p> <p>3 <b>sent around on Saturday, September 20th?</b></p> <p>4           A. Revised draft Clarification Letter</p> <p>5 that Mr. Leinwand sent around at --</p> <p>6 late Saturday night. It went out at</p> <p>7 11:13 p.m. Yes.</p> <p>8           <b>Q. And he circulated, the attachment</b></p> <p>9 <b>is both a clean version and a blackline?</b></p> <p>10           A. That is correct.</p> <p>11           <b>Q. The blackline is about halfway</b></p> <p>12 <b>through the document and it has at the top</b></p> <p>13 <b>"Cleary Gottlieb Comments." Do you see that?</b></p> <p>14           A. Yes.</p> <p>15           <b>Q. If you turn to the second page of</b></p> <p>16 <b>that, sir.</b></p> <p>17           A. Of the blacklined version?</p> <p>18           <b>Q. Yes.</b></p> <p>19           A. Yes.</p> <p>20           <b>Q. You will see there is a blackline</b></p> <p>21 <b>in section (d), the second half of the page.</b></p> <p>22           A. Yes.</p> <p>23           <b>Q. And if you scroll down about</b></p> <p>24 <b>two-thirds of the way down, you'll see a</b></p> <p>25 <b>reference to a Section A. Do you see that?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1           <b>-Lewkow-</b></p> <p>2           A. I see it.</p> <p>3           <b>Q. And the language reads, "By or on</b></p> <p>4 <b>behalf of LBI pursuant to Rule 15c3-3 of the</b></p> <p>5 <b>Securities Exchange Act of 1934, or</b></p> <p>6 <b>otherwise..." Do you see that?</b></p> <p>7           A. I do.</p> <p>8           <b>Q. And then it goes on to say, "Are by</b></p> <p>9 <b>or on behalf of any clearing agency or any</b></p> <p>10 <b>clearing organization to collateralize,</b></p> <p>11 <b>guarantee, secure, whether as margin,</b></p> <p>12 <b>guarantee funds, deposits or in any other</b></p> <p>13 <b>form." Do you see that that language, sir?</b></p> <p>14           A. I do.</p> <p>15           <b>Q. Now, were you aware that that</b></p> <p>16 <b>language was deleted from the next draft, at</b></p> <p>17 <b>least a subsequent draft of the Clarification</b></p> <p>18 <b>Letter?</b></p> <p>19           MR. MORAG: Objection to the form</p> <p>20 of the question; the characterization</p> <p>21 "delete."</p> <p>22           A. I believe so, yes.</p> <p>23           <b>Q. I'll show you a document that we'll</b></p> <p>24 <b>mark as 616A, which is Bates stamped</b></p> <p>25 <b>WGM-LEHMAN-E 00006236 through 6264?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1           <b>-Lewkow-</b></p> <p>2 <b>(Deposition Exhibit 616A, 9/22/08</b></p> <p>3 <b>e-mail from R. Messineo re:</b></p> <p>4 <b>Lehman-Barclays, WGM-LEHMAN-E</b></p> <p>5 <b>00006236-6264, marked for</b></p> <p>6 <b>identification, as of this date.)</b></p> <p>7 <b>(Witness reviewing document.)</b></p> <p>8           <b>Q. Take whatever time you need to</b></p> <p>9 <b>review the document, sir. What I want to know</b></p> <p>10 <b>is whether you have ever seen it before, this</b></p> <p>11 <b>or any part of the document?</b></p> <p>12           A. Well, I certainly never saw the</p> <p>13 cover e-mail from Mr. Messineo to your</p> <p>14 colleagues at Hughes Hubbard. I'm just trying</p> <p>15 to figure out the timing.</p> <p>16 <b>(Witness reviewing document.)</b></p> <p>17           A. May I look at the other -- the</p> <p>18 draft I was furnished this morning in</p> <p>19 connection with this deposition to see if this</p> <p>20 looks the same as the one that I've seen with</p> <p>21 a different transmittal e-mail?</p> <p>22           <b>Q. Feel free to look at any of the --</b></p> <p>23           A. Thank you.</p> <p>24           <b>Q. -- exhibits there.</b></p> <p>25           MR. MORAG: The 28 and the 37 --</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

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<p>1 -Lewkow-</p> <p>2 don't go through Sunday.</p> <p>3 THE WITNESS: Yeah, I'm looking at</p> <p>4 28. Well, I don't have it here then.</p> <p>5 Okay. Let me look at it and see if it</p> <p>6 helps me...</p> <p>7 A. I don't -- I would need to look at</p> <p>8 ones that I know I've seen. This does not --</p> <p>9 I don't know that I've seen this.</p> <p>10 <b>Q. If you look in particular --</b></p> <p>11 A. But, you know, and I realize</p> <p>12 litigators do things the way they do things</p> <p>13 for the reasons they do, but I'm sure you have</p> <p>14 all the ones that have been produced that we</p> <p>15 know I've received. So if you show me one</p> <p>16 that's got -- that I know I received it, then</p> <p>17 I can tell you if this is the same one or not.</p> <p>18 But on the face, and looking quickly, I don't</p> <p>19 recall this one.</p> <p>20 <b>Q. If you turn to the second page of</b></p> <p>21 <b>the document.</b></p> <p>22 A. Yup.</p> <p>23 <b>Q. Do you see that same section I</b></p> <p>24 <b>believe we were looking at. In the prior</b></p> <p>25 <b>draft, it was (d); here it is (c). You will</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 <b>see the language that I asked you to read</b></p> <p>3 <b>before --</b></p> <p>4 A. Yup.</p> <p>5 <b>Q. -- concerning margin --</b></p> <p>6 A. Yup.</p> <p>7 <b>Q. -- is crossed out or deleted?</b></p> <p>8 A. Yup.</p> <p>9 <b>Q. Does that refresh your recollection</b></p> <p>10 <b>that you were aware that that language had</b></p> <p>11 <b>been deleted from a draft of the --</b></p> <p>12 MR. MORAG: Objection to form.</p> <p>13 A. By counsel for Lehman Brothers?</p> <p>14 <b>Q. By anyone.</b></p> <p>15 A. It appears -- I don't know if this</p> <p>16 was -- again, it may have been delivered -- I</p> <p>17 can't tell without seeing this. It may well</p> <p>18 have been deleted from language that was --</p> <p>19 that we -- the version we saw. I do think</p> <p>20 that language never ended in, so I know it was</p> <p>21 deleted at some stage.</p> <p>22 Whether this draft is the one I saw</p> <p>23 or not? I think that language went in there,</p> <p>24 is my understanding. It went in there and I</p> <p>25 think it was wrong. It was taking away what</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1 -Lewkow-</p> <p>2 had been -- it's interesting. The language</p> <p>3 which you've shown me that went in, and it</p> <p>4 went in a draft that my partner Mr. Leinwand</p> <p>5 sent out.</p> <p>6 But it went in there and it</p> <p>7 suggests that we were taking out of the deal</p> <p>8 somehow what had been agreed to, which is that</p> <p>9 margins is part of the position. And I think</p> <p>10 that may be to deal -- in an effort, a</p> <p>11 mistaken effort to deal with OCC issues. But</p> <p>12 it was not the deal, and it should have never</p> <p>13 gone in, and it was taken out.</p> <p>14 <b>Q. Just so I can catch up with you.</b></p> <p>15 <b>You were referring to the version</b></p> <p>16 <b>that Mr. Leinwand sent out. That was</b></p> <p>17 <b>Exhibit 49?</b></p> <p>18 A. Yes. You showed me language that</p> <p>19 you read from that Exhibit 49.</p> <p>20 <b>Q. You're referring to the margin</b></p> <p>21 <b>language on page 2 in section (d)?</b></p> <p>22 A. Yes. That language was added,</p> <p>23 correct. And it's in the -- it was added as</p> <p>24 part of -- hold on a second.</p> <p>25 It was part of a sentence that said</p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1 -Lewkow-</p> <p>2 "Excluded Assets" -- I'm now confusing myself.</p> <p>3 Hold on a second.</p> <p>4 (Witness reviewing document.)</p> <p>5 A. Hold on a second. I withdraw what</p> <p>6 I just said. I shouldn't jump to conclusions.</p> <p>7 I think this is -- excuse me.</p> <p>8 (Witness reviewing document.)</p> <p>9 <b>Q. I think you withdrew what you said,</b></p> <p>10 <b>so maybe I should ask another question.</b></p> <p>11 A. Start over. Yes.</p> <p>12 <b>Q. Please take whatever time you need</b></p> <p>13 <b>to answer.</b></p> <p>14 A. I rushed. I should take my time</p> <p>15 then and answer it carefully.</p> <p>16 <b>Q. Understand that I don't want you to</b></p> <p>17 <b>reach conclusions. I'm really looking for</b></p> <p>18 <b>your recollections of what you previously</b></p> <p>19 <b>concluded or previously understood.</b></p> <p>20 A. Uh-huh.</p> <p>21 <b>Q. Does looking at the exhibits we put</b></p> <p>22 <b>in front of you refresh your recollection that</b></p> <p>23 <b>there was, in a draft of the clarification</b></p> <p>24 <b>language of the Clarification Letter, language</b></p> <p>25 <b>concerning margin?</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>



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<p>1           <b>-Lewkow-</b></p> <p>2           A. I see there is such language. I</p> <p>3           very vaguely recall such language now that I</p> <p>4           see it, but it's very vague.</p> <p>5           <b>Q. Do you have a recollection as to</b></p> <p>6           <b>whether that language was proposed by Cleary</b></p> <p>7           <b>Gottlieb?</b></p> <p>8           A. I don't know who proposed it. It</p> <p>9           was sent out in a draft that Dave Leinwand</p> <p>10          sent out.</p> <p>11          (Witness reviewing document.)</p> <p>12          <b>Q. Do you have an understanding,</b></p> <p>13          <b>sir --</b></p> <p>14          A. I was --</p> <p>15          <b>Q. Sorry.</b></p> <p>16          A. I was taking another look at it. I</p> <p>17          have not finished the answer.</p> <p>18          <b>Q. Sure. Please take as much time as</b></p> <p>19          <b>you need.</b></p> <p>20          (Witness reviewing document.)</p> <p>21          A. I believe.</p> <p>22          (Witness reviewing document.)</p> <p>23          A. I'm not certain.</p> <p>24          <b>Q. Do you know, sir, whether this</b></p> <p>25          <b>language was put in to reflect the business</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1           <b>-Lewkow-</b></p> <p>2           <b>agreement between the parties, that Barclays</b></p> <p>3           <b>should get Lehman's margin?</b></p> <p>4           MR. MORAG: Objection to form.</p> <p>5           A. It was my understanding that the</p> <p>6           Asset Purchase Agreement contemplated as part</p> <p>7           of Barclays' purchase of all of the assets</p> <p>8           used in the business subject -- other than</p> <p>9           Excluded Assets. That among the assets that</p> <p>10          Barclays was entitled to under the original</p> <p>11          Asset Purchase Agreement, including margin</p> <p>12          relating to the account that they were buying</p> <p>13          as part of the purchase of business.</p> <p>14          So to suggest that it was put in by</p> <p>15          someone in a draft was not to say that it</p> <p>16          wasn't -- again, these are people who were</p> <p>17          dealing with a lot of different things. It</p> <p>18          was not to make a -- to the extent that's what</p> <p>19          this document does or would have done if it</p> <p>20          were in the final agreement, it was not, in my</p> <p>21          view, making a change in what the deal was.</p> <p>22          <b>Q. So you understood that this</b></p> <p>23          <b>language was effectuating the APA by conveying</b></p> <p>24          <b>the margin from Lehman to Barclays?</b></p> <p>25          MR. MORAG: Objection to the form</p> <p>TSG Reporting - Worldwide 877-702-9580</p>
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<p>1           <b>-Lewkow-</b></p> <p>2           of the question.</p> <p>3           A. "Effectuating" is a funny word.</p> <p>4           But I think it was consistent with the APA in</p> <p>5           view of the -- again, things were being done</p> <p>6           to the Clarification Letter on other things</p> <p>7           that had been done. And there had been</p> <p>8           changes made to cause romanette ii on page 1</p> <p>9           over to the definition of what were Purchased</p> <p>10          Assets.</p> <p>11          We had, by this stage, I believe,</p> <p>12          deleted the reference that had originally been</p> <p>13          in the Asset Purchase Agreement. The</p> <p>14          reference to "long positions" had been</p> <p>15          deleted, and there were changes that reflected</p> <p>16          the Repurchase Agreement that we were -- we</p> <p>17          had already paid for. Barclays had</p> <p>18          effectively already paid for the securities.</p> <p>19          And those were changes. And I think people</p> <p>20          were trying to make changes that preserved the</p> <p>21          -- the provision of what was in the Asset</p> <p>22          Purchase Agreement.</p> <p>23          <b>Q. Did you have an understanding that</b></p> <p>24          <b>there was anything wrong in this language,</b></p> <p>25          <b>that there was anything -- any respect to</b></p> <p>TSG Reporting - Worldwide 877-702-9580</p>	<p>1           <b>-Lewkow-</b></p> <p>2           <b>which this reference to "margin" here, this</b></p> <p>3           <b>language, failed to effectuate the parties'</b></p> <p>4           <b>business agreement?</b></p> <p>5           MR. HUME: I'm going to object to</p> <p>6           the form of the question and the lack</p> <p>7           of foundation. Just to make clear --</p> <p>8           correct me if I'm wrong -- Mr. Lewkow</p> <p>9           is not the 30(b)(6) witness --</p> <p>10          THE WITNESS: No, I'm not.</p> <p>11          MR. HUME: -- on this provision?</p> <p>12          MR. MORAG: He is not.</p> <p>13          MR. HUME: And he's testified he</p> <p>14          doesn't recall the provision.</p> <p>15          THE WITNESS: I don't recall.</p> <p>16          MR. HUME: So I think I'm going to</p> <p>17          object on lack of foundation as well.</p> <p>18          <b>Q. You don't --</b></p> <p>19          A. I don't personally recall.</p> <p>20          <b>Q. You don't recall. Okay.</b></p> <p>21          <b>You referred to "Excluded Assets."</b></p> <p>22          <b>Can I ask you to take out the Asset Purchase</b></p> <p>23          <b>Agreement, Exhibit 1, somewhere in that file</b></p> <p>24          <b>before you?</b></p> <p>25          A. Yup. I have it.</p> <p>TSG Reporting - Worldwide 877-702-9580</p>

1 -Lewkow-  
2 **Q. When you described in your**  
3 **Declaration that none of your partners had**  
4 **indicated any suggestion that any property**  
5 **that was collateralizing exchange-traded**  
6 **derivatives was going to Barclays?**

7 MR. MORAG: That was not --

8 THE WITNESS: I think you got it  
9 backwards.

10 MR. MAGUIRE: I'm sorry. Did I put  
11 a double negative there?

12 MR. MORAG: You said none was going  
13 to Barclays?

14 A. Why don't you start over?

15 **Q. Yes.**

16 A. Do you want to look at my  
17 declaration?

18 **Q. Still looking at your Declaration.**  
19 **Yes. It think it was Paragraph 17 we were**  
20 **looking at.**

21 A. Yes.

22 **Q. And that was the suggestion there?**

23 A. That "no one had suggested in my  
24 presence or based on my conversations" --

25 **Q. Yes.**

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1 -Lewkow-

2 A. "--in my partners' presence that  
3 any portion of the property held to secure  
4 Lehman's exchange-traded derivatives was not  
5 to be transferred to Barclays as part of the  
6 transaction."

7 **Q. Did any of your partners bring to**  
8 **your attention any of the particular**  
9 **provisions of the Asset Purchase Agreement in**  
10 **connection with the conversations you**  
11 **described in Paragraph 17?**

12 MR. HUME: I think that calls for  
13 privileged work product. You're asking  
14 did anyone --

15 **Q. Yes. Did anyone say to you in**  
16 **words or substance: Mr. Lewkow, you've asked**  
17 **me whether anything here is suggestive that**  
18 **this property was not going to Barclays, well,**  
19 **you better take a look at this particular**  
20 **section of the Asset Purchase Agreement?**

21 MR. HUME: I think it still does  
22 call for a privileged communication or  
23 interpretation of the contract. The  
24 declaration says no one --

25 MR. MORAG: Why don't you ask him  
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1 -Lewkow-  
2 if his statement of declaration is  
3 consistent with his understanding of  
4 the Asset Purchase Agreement?

5 **Q. I'm asking about the conversations**  
6 **that you had with your partners that you**  
7 **referred to.**

8 **In any of those conversations, did**  
9 **any of those partners say, You better look at**  
10 **this?**

11 A. I'm not an expert on 30(b)(6). I  
12 would refer to M&A litigation counsel who are  
13 sitting in the next two seats to my right.

14 But it seems to me if any of them  
15 did do it and they were here in their personal  
16 capacity being deposed about how they  
17 interpreted the contract, they wouldn't be  
18 required to tell you the interpretation.

19 Therefore, the fact is that as  
20 30(b)(6), I can't imagine, changes the rules  
21 on that. But I would defer to my counsel and  
22 counsel for Barclays on that. I told you, I  
23 used to be a lawyer.

24 MR. HUME: I think you should  
25 answer the question and we should take

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1 -Lewkow-  
2 a short break.

3 THE WITNESS: I should answer the  
4 question?

5 MR. HUME: Answer the question if  
6 it doesn't reveal a privilege.

7 A. Can I hear the question again?

8 **Q. Did any of the partners to whom you**  
9 **refer in Paragraph 17 say to you, in**  
10 **connection with whether there was any**  
11 **suggestion that any of this property was not**  
12 **to be transferred to Barclays, did any of them**  
13 **say, You better look at this provision of the**  
14 **Asset Purchase Agreement?**

15 A. No.

16 **Q. Either in those words or in**  
17 **substance.**

18 A. I am familiar with the Asset  
19 Purchase Agreement. I think the Asset  
20 Purchase Agreement always reflected the  
21 understanding of the parties that this was  
22 coming along that I could point to, they can  
23 point to provisions that show that.

24 Did any of them suggest there was  
25 language inconsistent with this? I don't

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1 -Lewkow-  
2 recall anyone suggesting that.  
3 MR. HUME: Do you want to take a  
4 short break?  
5 MR. MAGUIRE: Sure.  
6 (Whereupon, a recess was taken  
7 from 4:50 p.m. to 5:01 p.m.)  
8 MR. MAGUIRE: Sir, I have no  
9 further questions, thank you.

10 EXAMINATION BY  
11 MR. HUME:

12 **Q. Mr. Lewkow, I'm Hamish Hume and I'm**  
13 **here representing Barclays, as you know. I**  
14 **just wanted to make sure one thing on the**  
15 **record is clear.**

16 **On page 197 of the rough transcript**  
17 **we are looking at, you were asked a question**  
18 **by counsel for the Trustee. This was**  
19 **referring to the conversation you testified to**  
20 **with Weil Gotshal about the \$769 million in**  
21 **securities.**

22 **The question was: "And did you**  
23 **understand that person from Weil to be**  
24 **agreeing that Barclays would get \$769 million**  
25 **unconditionally as part of the sale as opposed**

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1 -Lewkow-  
2 **to simply agreeing to the inclusion of the**  
3 **language proposed 'to the extent permitted by**  
4 **applicable law'?"**

5 **Your answer was "No," and then you**  
6 **went on with an explanation.**

7 **Let me just make sure the record is**  
8 **clear in terms of the "yes" and the "no" of**  
9 **that question.**

10 **Was it your understanding from your**  
11 **conversation with Weil Gotshal that you**  
12 **referenced relating to the \$769 million in**  
13 **securities, that Barclays did have an**  
14 **unconditional right to receive those assets?**

15 A. Yes. The question, with all due  
16 respect, was ambiguous, because I was offered  
17 a choice, was I agreeing -- was the Lehman  
18 person agreeing unconditionally to pay or  
19 agreeing -- "simply agreeing," was your term,  
20 to the inclusion of language "to the extent  
21 permitted by applicable law." That was a  
22 choice. And I started with "no." My "no" was  
23 addressed to the end of your question, that it  
24 was not merely "to the extent permitted by  
25 applicable law."

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1 -Lewkow-  
2 It was, as I explained in the rest  
3 of my answer, the discussion of "the  
4 applicable law," as I understood what the  
5 individual was saying on behalf of Lehman, was  
6 merely to 15c3-3 and not to the concept that  
7 if that were not payable, there would be an  
8 unconditional obligation to deliver the  
9 securities some other way.

10 MR. HUME: I have no other  
11 questions.

12 MR. MAGUIRE: Nothing further.  
13 (Time noted: 5:05 p.m.)  
14

15  
16  
17 \_\_\_\_\_  
18 VICTOR I. LEWKOW  
19

20  
21 Subscribed and sworn to before me,  
22 this \_\_\_\_ day \_\_\_\_\_ of 2010.  
23

24  
25 \_\_\_\_\_  
Notary Public

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1 -----I N D E X-----  
2 WITNESS EXAMINATION BY PAGE  
3 V. LEWKOW MR. GAFFEY 5  
4 MR. MAGUIRE 160  
5 MR. HUME 226  
6

7 DIRECTIONS: PAGE 79, 134, 185  
8 MOTIONS: [None]  
9 REQUEST: [None]

10 -----EXHIBITS-----  
11  
12 EXHIBIT FOR I.D.  
13 Exhibit 613A 6  
14 Declaration of Victor Lewkow  
15

16 Exhibit 614A 135  
17 Letter from S&C, CGSH  
18 00020701-20714  
19

20 Exhibit, 615A 195  
21 2PP 9/18/08 e-mail from J.  
22 Potenciano to distribution re:  
23 Preliminary 15c3-3 reserve lock-up  
24 as of 9/17/08  
25

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1	-----EXHIBITS-----	1	C E R T I F I C A T E
2	[previously marked]	2	
3	EXHIBIT FOR I.D.	3	STATE OF NEW YORK )
4	Exhibit 1 29	4	) ss.:
5	Exhibit 19 31	5	COUNTY OF KINGS )
6	Exhibit 518 45	6	I, MAYLEEN CINTRON, a Registered
7	Exhibit 25 47	7	Merit Reporter, Certified Realtime
8	Exhibit 24 58	8	Reporter and Notary Public within and
9	Exhibit 27 69	9	for the State of New York, do hereby
10	Exhibit 579B 74	10	certify:
11	exhibit 581B 92	11	That VICTOR I. LEWKOW, the witness
12	Exhibit 28 93	12	whose deposition is hereinbefore set
13	Exhibit 29 93	13	forth, was duly sworn by me and that
14	Exhibit 30 93	14	such deposition is a true record of the
15	Exhibit 31 93	15	testimony given by such witness.
16	Exhibit 32 93	16	I further certify that I am not
17	Exhibit 33 93	17	related to any of the parties to this
18	Exhibit 34 93	18	action by blood or marriage; and that I
19	Exhibit 35 93	19	am in no way interested in the outcome
20	Exhibit 36 93	20	of this matter.
21	Exhibit 37 93	21	IN WITNESS WHEREOF, I have hereunto set
22	Exhibit 34 95	22	my hand this 10th day of February, 2010.
23	Exhibit 451 208	23	
24	Exhibit 49 210	24	-----
25	- - -	25	MAYLEEN CINTRON, RMR, CRR
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1	ERRATA SHEET FOR THE TRANSCRIPT OF:
2	Case Name: Re: Lehman Brothers Holdings
	Dep. Date: February 10, 2010
3	Deponent: Cleary Gottlieb   Victor I. Lewkow
4	Pg. Ln. Now Reads Should Read Reason
5	_____
6	_____
7	_____
8	_____
9	_____
10	_____
11	_____
12	_____
13	_____
14	_____
15	_____
16	_____
17	_____
18	_____
19	
20	
21	VICTOR I. LEWKOW
22	
23	SUBSCRIBED AND SWORN BEFORE ME,
24	This__ day of_____, 2010.
25	Notary Public
	My Commission Expires:_____
	TSG Reporting - Worldwide 877-702-9580